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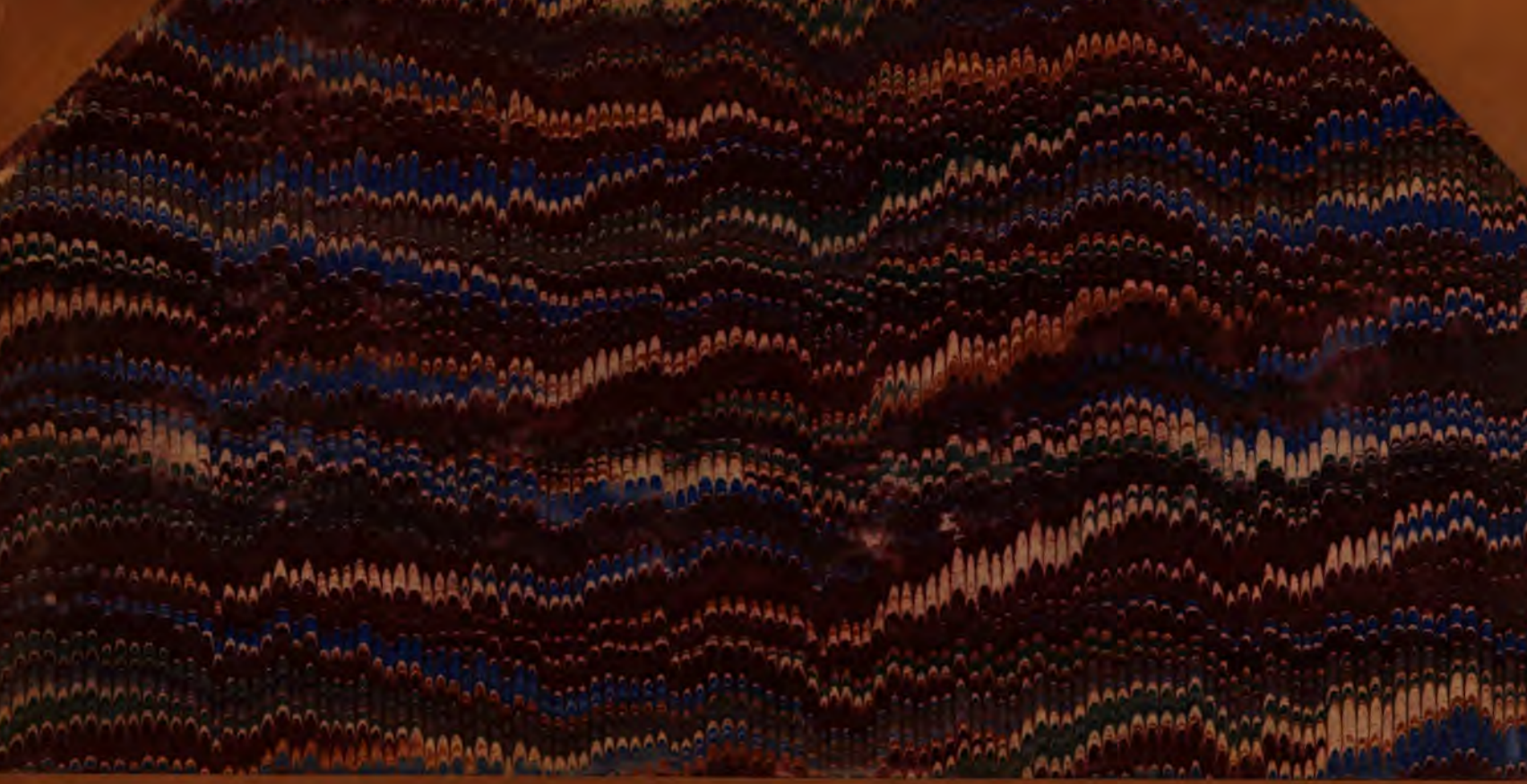

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RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

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REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE, JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, professeur à la Faculté de Droit de l'Université Laval à Montréal

TOME III

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ABRÉVIATIONS.

D. T. B. C.:—Décisions des Tribunaux du Bas-Canada en 17 volumes, commencées en 1851, par M. M. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.

R. J. R. Q.:—Rapports Judiciaires Revisés de la province de Québec, par le juge MATHIEU.

C. C.:—Code Civil du Bas-Canada.

C. P. C.:—Code de Procédure Civile du Bas-Canada.

C. M.:—Code Municipal de la province de Québec.

S. R. Q.:—Statuts Refondus de la province de Québec.

C. B. R.:—Cour du Banc de la Reine, ou *Cour du Banc du Roi.*

C. S.:—Cour Supérieure du Bas-Canada.

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RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

VENTE A LA FOLLE ENCHERE.

SUPERIOR COURT, Quebec, 5 mai 1851.

Before BOWEN, Chief Justice, DUVAL, and MEREDITH, Justices.

MEATH & al., Plaintiffs, *vs.* FITZGERALD, Defendant, and MONAGHAN, Adjudicataire, and CHARLTON, Intervenant.

La cour ne permettra pas la revente d'un immeuble à la folle enchère d'un adjudicataire, durant la litispendance d'une intervention, au moyen de laquelle un tiers demande que le décret soit annulé; et sous les mêmes circonstances, elle n'accordera point la contrainte par corps pour défaut de paiement du prix d'acquisition. (1)

By virtue of a writ of *fieri facias de terris* issued out of the Leeds Circuit Court, on the 8th March, 1850, at the instance of the Plaintiffs, the sheriff of the district of Quebec seized, as belonging to Defendant, certain lands which in the advertisement, were stated to be situate in the seigniory of Beaurivage, in the parish of St. Giles, and announced the same for sale at the church door of the parish of St. Sylvestre, on the 30th July, 1850.

On the last mentioned day, the sheriff adjudged these lands to Monaghan, for the sum of £30 currency; and the writ of execution was filed in the prothonotary's office, at Quebec, on the 6th August following, with the sheriff's return that the *Adjudicataire* had neglected to pay that amount into his hands.

On the 4th September, 1850, Charlton filed an intervention, alleging, that no such immoveable property as that described in the advertisement existed at the time of the seizure, or of the sale thereof; that the said lands were, on the con-

(1) V. art. 690 C. P. C.

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trary, situate in the parish of St. Sylvestre; and that the description thereof given by the sheriff, was erroneous; that the said lands were not, at the time of the seizure and sale thereof, and for a long time previously thereto, had not been the property of the Defendant, nor were in his possession, but, on the contrary, were the property of him, the *Intervenant* (Charlton), having acquired the same from James Fitzgerald and wife, by deed of sale executed before notaries, on the 18th November, 1843, which deed had been registered on the 28th November, 1844.

The intervention further alleged that, in consequence of the discrepancy that existed between the sheriff's description of the property seized, and that belonging to the *Intervenant*, the *Intervenant* was unable to discover, and did not know that by virtue of the sheriff's advertisement, it was intended to sell the property of the *Intervenant*, situate in the parish of St. Sylvestre; and that, he could not file, within the delay prescribed by law, his opposition *à fin d'annuler*.

The intervention concluded by praying that the seizing of the said lands, and the sale thereof should be declared null.

The case remained in this position until the 21st April, 1851, when the Plaintiffs obtained a rule against the *Adjudicataire* to shew cause why the sheriff should not proceed *de novo* to the sale of the said lands, at his *folle enchère*.

The *Adjudicataire* contended that he was not bound to pay the price of the sale, until the intervention filed by Charlton had been disposed of; that by it the Plaintiffs' right to seize the property was denied, and the act of seizure characterised as illegal; that he had never been put in possession of the property, and that, were he to pay the amount claimed, Plaintiffs would obtain money from him without being able to procure a valid title, or legal possession; and that, in the event of the intervention being maintained, the property would still remain in Charlton's possession, and the *Adjudicataire* would have been deprived of his money and the interest thereof, as well as of the lands; and this, through the fault of the Plaintiffs themselves, who were bound to contest or admit the facts alleged in the intervention, and obtain a decision on the points therein raised, before they could compel him to pay any sum whatever.

The Plaintiffs argued that they were not bound to wait till the intervention was disposed of; and stated that the discrepancy alleged could not be substantiated by proof. Judgment the 5th May, as follows:

The court seeing the intervention of Richard Charlton, praying, for the causes therein stated and set forth, that the sale made to the *Adjudicataire* by the sheriff be declared

null and void, which intervention is still pending and undetermined, doth discharge the said rule, with costs. (1 *D. T. B. C.*, p. 241.)

PENTLAND, for Plaintiffs.

POPE, for the Adjudicataire.

BILLETS PROMISSOIRES.—PROTET.

SUPERIOR COURT, Montreal, 16 avril 1851.

Before SMITH, VANFELSON, and MONDELET, Justices.

JESSE JOSEPH, *vs.* CHARLES M. DELISLE and al.

Jugé: Que sous la 14e sec. de la 12e Vic., chap. XXII, relative aux billets promissoires, l'omission d'énoncer dans un protêt notarié, que tel protêt a été fait dans l'après-midi du jour de sa signification, est fatale, et que l'endosseur de tel billet est libéré.

This was an action against the maker and endorser of a promissory note, for £60, protested. The Plaintiff proceeded *ex parte* against Delisle, the maker; the other Defendant, Ross, the endorser, appeared, and pleaded that the note was not executed and delivered, and endorsed as alleged in the Plaintiff's declaration; that no demand of payment had been made within the period prescribed by law, and that it did not appear that the note was *legally protested;* also that no notice of non-payment and protest had been sent to the endorser.

The Counsel for Ross contended that there was no proof of legal presentment and protest, and cited the 14th clause of the promissory note act, 12th Vict., ch. 22nd, which enacts: "That, "if at the expiration of the *forenoon* of the last day of grace, "any bill or note shall be unpaid, the holder thereof may "cause the same to be duly presented for payment, and, in "default thereof, to be protested for non-payment: provided "always, that no presentment and protest for non-payment of "any bill or note shall be sufficient to charge the parties "liable on such bill or note, unless such presentment and pro-"test be made in the *afternoon* of the last day of grace; and, "further, provided always that the liability of such acceptor "or maker towards the holder, shall continue in full force and "effect, although the liability of the other parties may be dis-"charged from the want or illegality of protest or of notice "of protest." (1) That there was nothing in this case to show

(1) Par la s. 51 du ch. XXXIII des statuts du Canada de 1890, 53 Vict., il est décrété que tout protêt pour refus d'acceptation ou de paiement peut être fait le jour même du refus, en tout temps après le refus d'acceptation, ou, dans le cas de refus de paiement, en tout temps après trois heures de l'après-midi.

a presentment and protest on the *afternoon* of the last day of grace; that the mere mentioning of the day, without stating the precise time was not sufficient, inasmuch as it might have been in the forenoon; that the words of the statute were absolute on this point, and that the endorser must be discharged for want of legal protest.

David, *contra*, argued that the form provided by the Legislature had been strictly followed, and that, inasmuch as the notice of the notary to the endorser was that the note had been duly protested, the court would not be justified, in the absence of any proof by the endorser, in coming to the conclusion, that the presentment and protest were made in the forenoon.

The court, declared that Ross, the endorser, must be discharged from his liability, for the want of a protest duly made. This protest does not show whether it was made in the forenoon or afternoon, as required by the 14th section of 12th Vict., ch. XXII, and the objection is fatal. The note did not become due till noon, and therefore no protest could be made until the afternoon.

Action maintained against Delisle, and dismissed, as to Ross. (1 *D. T. B. C.*, p. 244.)

DAVID, for Plaintiff.

MACRAE and WOOD, for ROSS.

PROCEDURE.—BREFS DE PREROGATIVE.

SUPERIOR COURT, Montreal, 16 avril 1851.

Before DAY, SMITH, and VANFELSON.

JEAN CREBASSA et al., *vs.* OLIVIER PELOQUIN.

Jugé: Que les formalités requises d'après les lois anglaises en matières ayant rapport à la protection et à la régie des corps incorporés, et aux *writs* appelés *Prerogative writs*, ont été abolies par la 12e Vic., ch. XLI (1); et aussi, que certaines personnes se qualifiant citoyens notables, sans prendre la qualité de fabriciens ou paroissiens, ne peuvent maintenir une application pour expulser un individu qui a usurpé l'office de marguillier de l'œuvre et fabrique.

This was a *requête libellée*, made by certain parties describing themselves as *citoyens notables*, residing in the parish of St. Pierre de Sorel, in the district of Montreal, against the

(1) Ce statut est intitulé "acte pour définir le mode des procédures à adopter dans les cours de justice du Bas-Canada dans les matières relatives à la protection et à la régie du droit de corporation et aux brefs de prérogative, et pour d'autres fins y mentionnées." Les principales dispositions de ce statut sont reproduites dans les articles 997 à 1030 C. P. C.

Defendant, as exercising the office of *marguillier de l'œuvre et fabrique* of the said parish.

The petition set forth the usurpation of the office of *marguillier* by the Defendant, and his illegal exercise of the same; that the petitioners were all interested in the said office " en autant qu'ils sont intéressés à l'administration des " affaires de la dite charge de marguillier de l'œuvre et fabri- " que de la dite paroisse, et se considèrent lésés et injuriés par " cette usurpation et détention de la part du dit Olivier " Peloquin, et, en conséquence, sont bien fondés à se plaindre " et à se pourvoir, comme ils le font par la présente requête " libellée," and concluded for his expulsion, with a penalty of £100.

The Defendant pleaded: 1° an *exeeption à la forme*, in which he alleged that the writ of summons, and *requête libellée* of the Plaintiffs were *illégalement et irrégulièrement émanées*, inasmuch as neither the *requête*, nor the accompanying affidavits, contained any formal and substantial allegations, or set forth any specific circumstances from which it might be inferred, in fact or in law, that the Defendant had usurped the office; such special enunciation of facts and circumstances being absolutely required *à peine de nullité*, to constitute a *requête libellée, au désir de la loi*; 2° *défense au fonds en droit*, embodying substantially the same reason.

The parties were heard on the *exception à la forme*. The Defendant's counsel contended that the act 12th Vict., ch. XLI, in prescribing the practice to be observed on proceedings of this nature, made it imperative on the Petitioners to show, on the face of their petition, the nature of their title, and of the intrusion complained of, in order that the court might see whether they were entitled to the specific remedy asked for: that it was not sufficient for the Plaintiffs to say that there was an intrusion, but that the court was to decide this from the specific facts alleged in the *requête libellée*; that, without this, the court would be left in uncertainty as to the necessary proceedings to be adopted, and whether these proceedings ought to be by *mandamus* or *quo warranto*; that the language of the 11th section of the act, which speaks of " all cases in which a writ of *mandamus* will be and may be legally issued in England," confirmed this view of the case, and proved that there was no intention to abolish the rule observed in England, that the nature of the intrusion must be suggested in the writ itself.

Judgment, 4th March, dismissing the *exception*. VANFELSON, Justice, observing that the court must be governed by the statute itself, which had swept away the rules applied in England in similar cases, in order to afford a summary process

for removing parties who had intruded themselves into a public office or franchise : all that it was necessary to do then was to look to the *requête libellée*, to see if an intrusion had been alleged within the terms of the statute. In this case, the court thought that there was, and that the Plaintiffs had sufficiently complied with the first section of the act.

The parties were afterwards heard on the *défense en droit*, and, on the 16th April, VANFELSON, Justice, gave judgment, discharging the *délibéré*, on the ground that the interest exposed by the Petitioners was not a legal interest. On looking at the *requête*, the court saw that the parties applicant merely styled themselves *citoyens notables* of Sorel, without taking the quality of *fabriciens*, or *paroissiens*, which was necessary. The court was of opinion that, in cases of this kind, the quality of *citoyens notables* was not recognised by law : if it were otherwise, persons of a different religious denomination, not belonging to the *fabrique*, might mix themselves up with others to bring actions against the *fabrique*. This clearly could not be allowed ; to have this right, they must be *paroissiens* and of the same religious denomination : the mere fact of residence or being *citoyens notables* was not sufficient. The *délibéré*, therefore, would be discharged, to enable the parties to take such course as they might be advised. (1 *D. T. B. C.*, p. 247.)

PELLETIER and PAPIN, for Petitioners.

CARTIER and CARTIER, for Defendant.

NOVATION.

SUPERIOR COURT, Montreal, 16 April, 1851.

Before DAY, VANFELSON, and MONDELET, Justices.

ANDREW MACFARLANE *vs.* THOMAS PATTON.

Jugé : Que s'il n'y a pas mention expresse dans un acte qu'il y a novation, le créancier peut fonder son action sur la créance originaire, s'il le juge à propos. (1)

Action of *assumpsit*, for £90-1-1, for the price and value of goods and merchandise sold and delivered. The indebtedness was alleged to be on the 17th May, 1850.

The Defendant pleaded : 1° That, by a certain deed executed by and between the Plaintiff and himself before notaries, on the 17th May, 1850, he had acknowledged himself to be

(1) V. art. 1171 C. C.

indebted to the Plaintiff, in the sum of £80 currency, for the value of merchandise sold to him by the Plaintiff, which sum he bound himself to pay, on demand, three months after the date: and for the due payment thereof, hypothecated certain immoveables belonging to him; that he was not indebted to Plaintiff in any sum of money, or for any cause of action, or debt, other than that mentioned in the said deed, and for which no action had been brought; that the goods and merchandise for which the present action was brought, were sold and delivered by Plaintiff to Defendant, on, or before the 17th May, 1850, and that the said deed, acknowledging the said debt of £80, and giving a mortgage therefore, was granted by Defendant, to Plaintiff, in satisfaction and payment of the same, by reason of which the claim of Plaintiff had been *novated.*

Plaintiff replied specially that the said sum of £80 did not constitute the full amount of indebtedness of Defendant to Plaintiff, on the 17th May, when the deed referred to was executed, but, on the contrary, the said sum of £80 currency, formed part merely of the sum of £90 - 1 - 1 mentioned in Plaintiff's declaration; that the said deed was not executed, to novate, said debt of £90 - 1 - 1, but was merely executed for the purpose, of giving Plaintiff collateral security for faithful payment of said debt, to the extent of the amount of £80 currency.

STUART H., for Defendant: The principle of the French law is, that it is unnecessary that there should by any special expression of the will of the parties to produce *novation:* it is sufficient that such will should be plainly and indubitably apparent. In all cases, when additional obligations and securities are taken without producing novation, they must be collateral, and cease, and be extinguished upon the payment of the original debt. In this case, the obligation mentioned in the plea was an independent, not a collateral obligation, having for its cause the purchase of merchandise, and entirely extinguished the existence of any supposed open account. Indeed, it is scarcely probable that any action upon an open account, would be instituted upon the day on which an obligation for the amount of such account had been consented and given: the written engagement superseding the verbal one. (1)

DUNKIN, for Plaintiff: *Novation* is not to be presumed, but must always be expressly declared. In this case, the deed was a mere collateral security, and could not operate as a *novation* of the debt.

(1) Toullier, vol. VII, nº 272 *et seq.*; Poth., *Oblig.*, nº 581 *et seq.*; Trop., I vol., nº 199; Merlin, *Rép.*, *verbo* novation; Dénizart, vol. III, p. 463.

The court decided that, without express mention of *novation* in the deed, the presumption was in favor of the creditor that no *novation* had taken place, and his right to sue upon the original claim, if he saw fit, remained to him. Judgment for the Plaintiff. (1 *D. T. B. C.*, p. 250.)

BETHUNE and DUNKIN, for Plaintiff.

NYE and FLEMING, for Defendant.

LOUAGE.—PROCEDURE.—DECLARATION.

SUPERIOR COURT, Quebec, 13 mai 1851.

Before BOWEN, Chief Justice, DUVAL, and MEREDITH, Justices.

PIRRIE *vs.* MCHUGH and PURCELL.

Une dèmande pour une somme d'argent due pour loyers en vertu d'un bail notarié est suffisante, sans qu'il soit nécessaire d'alléguer que le locataire s'est mis en possession et a eu la jouissance des lieux loués, ou que le Demandeur a rempli les obligations qui lui étaient imposées par le bail.

The declaration alleged that, on the 19th March, 1850, by notarial deed, Plaintiff leased, for the term of one year, from the 1st May then next, and to end on the 30th April, 1851, to one McGolrick, certain premises situate in the city of Quebec; in consideration whereof, McGolrick promised to pay Plaintiff £230, in the manner and at the times specified in the lease; that the Defendants were parties to the deed, and became severally the sureties of McGolrick, for the payment of the rent; and that the sum demanded was due to the Plaintiff by McGolrick for rent, under the lease.

To this declaration, Defendant, Purcell, demurred: alleging that the same was insufficient in law, because, although the alleged contract declared upon, was a *contrat synallagmatique,* imposing obligations upon either party, and after the alleged passing thereof became *exécutoire* on the part of the Plaintiff, when the period should arrive at which the lease was to commence; yet that it was not alleged that McGolrick had ever made any entry on, or into the premises, or that he had ever used or occupied them; and that no action *ex locato* could be maintained, unless use and occupation were alleged, by virtue of which alone rent could become due; that it would have been competent to the Plaintiff to sue the Defendants in an action *ex contractu* without alleging an entry, or use and occupation; but the Plaintiff having sued in an action *locati,* had shewn no cause of action

for the recovery of any sum due as rent. In support of his position, the Defendant, Purcell, referred to Poth., *Louage*, n°s 1, 6, 53, 54, 133, 142; 1 Chitty, on Pleadings, p. 197, 293, 294, 296, 320, 321, 323.

The Plaintiff argued that the use and occupation was a matter of proof; and that the action was brought on the contract between the parties.

Judgment the 13th May, 1851, declaring the allegations of the declaration sufficient in law, and overruling the demurrer, with costs. (1 *D. T. B. C.*, p. 271.)

CANNON L. A., for Plaintiff.

POPE, for Defendant, Purcell.

APPEL AU CONSEIL PRIVE.

BANC DE LA REINE, EN APPEL, Montréal, 16 janvier 1851.

Présents: Sir J. STUART, Juge en Chef, ROLLAND, PANET, et AYLWIN, Juges.

GUGY, Appelant, *et* GUGY, Intimée.

Jugé: Que le droit d'appel à Sa Majesté, en son conseil privé, sur une opposition faite par le Défendeur à l'exécution d'un jugement, est réglé par la nature et par la qualité de la demande, et non par les matières invoquées en l'opposition du dit Défendeur. (1)

Le jugement dont est question fut rendu sur une motion faite par l'Appelant, pour permission d'appeler à Sa Majesté, en son conseil privé, du jugement rendu par la Cour du Banc de la Reine (en appel), en juillet 1850, sur une opposition, par l'Appelant, à l'exécution d'un jugement obtenu contre lui par l'Intimée pour la somme de £944. Le 9 février 1849, l'Intimée fit émaner un bref d'exécution pour la somme de £200, avec intérêt, étant la balance du jugement. Les meubles de l'Appelant furent saisis, et ce dernier fit opposition à la saisie, alléguant que la créance de l'Intimée était compensée et éteinte, l'Appelant ayant contre elle, tant en son propre nom que comme légataire universelle, trois jugements au montant d'environ £10,000.

L'Appelant prétendait que, vu que les sommes en litige, mentionnées en son opposition, excédaient £500, la loi lui accordait un appel à Sa Majesté.

Sir J. STUART, juge en chef, en rendant jugement sur cette demande, observa que le statut de la 34 Geo. III, n'accordait ce recours que dans deux cas, savoir, lorsque la matière en

(1) V. art. 1178 C. P. C.

dispute excède la somme de £500 sterling, ou a rapport à quelque honoraire d'office, droit, rente, revenu ou aucune somme due à Sa Majesté, titre à quelqu'immeuble, rentes annuelles ou autres matières ou choses de nature à lier les droits à l'avenir des parties. Dans la présente cause, le jugement fut rendu pour une somme de £200, pour laquelle l'Intimée fit émaner un bref (*writ*) d'exécution, et c'est sur une opposition faite à cette exécution par l'Appelant, qu'appel a été interjeté. L'exécution ici est la demande, et l'opposition n'est qu'une exception à cette demande ; c'est donc l'exécution qui doit régler le recours de l'Appelant, et comme elle ne peut être rangée dans aucune des catégories pour lesquelles la loi accorde un appel à Sa Majesté, la motion de l'Appelant ne peut être accordée. (1)

JUDAH THOS., pour l'Appelant.

CHERRIER et DORION, pour l'Intimée.

PROMESSE DE VENTE.

BANC DE LA REINE, EN APPEL, Montréal, 15 janvier 1851.

Présents : Sir JAMES STUART, Juge en Chef, ROLLAND, PANET, et AYLWIN, Juges.

KERR, Appelant, et LIVINGSTON, Intimé.

Jugé : Qu'un acte portant être une promesse de vente, mais contenant saisine en faveur de l'acquéreur, et dépossession du vendeur, est une véritable vente nonobstant la condition de passer titre après paiement du premier installement.

La demande était portée par l'Appelant contre l'Intimé pour le recouvrement de la somme de £60, montant de deux termes de paiement, en vertu d'une promesse de vente, par l'Appelant au Défendeur, Intimé, d'un immeuble, dans lequel acte on remarque les clauses suivantes :

" To have, use and enjoy the aforesaid bargained premises, " with their rights, members and appurtenances, unto the said " purchaser, his heirs and assigns, as his and their own proper " freehold, for ever, by virtue of these presents, and to enter

(1) Dans la cause de LESPÉRANCE, Appelant, et ALLARD, Intimé, jugée au même terme de la Cour d'Appel devant les mêmes juges, une question analogue s'est présentée sur appel d'un jugement déboutant une opposition à fin d'annuler, faite par le Défendeur, à la saisie et vente de ses immeubles.

Le jugement ayant été confirmé, l'Appelant demanda la permission d'appeler à Sa Majesté en son conseil privé.

Cette demande fut rejetée, Sir JAMES STUART, juge en chef, remarquant que cette opposition ne contenait aucune matière pécuniaire, et ne tombait dans aucune des catégories mentionnées dans le statut.

" upon and take possession of the aforesaid south west half, " or moiety, of the said lot and premises, from this present " day.

" The present promise of sale is made, in manner as afore- " said, and for and in consideration of the sum of £60, payable " to the said vendor, as follows, £30 pounds in one year, and " the other £30 in two years.

" And the said William Kerr doth hereby promise, bind and " oblige himself, his heirs or assigns, to pass a deed of sale in " favor of the said purchaser, when the first £30 will be paid.

" And, in consideration of the aforesaid promise of sale, the " said vendor doth, hereby, transfer and set over to the said " purchaser all right of property which the said vendor can " have in or upon the aforesaid lot of land."

L'Appelant, en sa déclaration, après avoir relaté partie du dit acte, alléguait qu'à la date du dit acte, et en vertu d'icelui, le Défendeur prit possession du lot de terre et en jouit depuis lors comme propriétaire.

Le Défendeur n'ayant pas plaidé à l'action, l'Appelant, se reposant sur l'acte en question, inscrivit sa cause pour audition au mérite, et, le 18 février 1850, la cour, composée des juges Day et Smith, rendit le jugement qui suit :

" The court, having examined the proof of record, and, more particularly, the deed filed by the Plaintiff ; considering that the Plaintiff has failed to prove the allegations of his declaration in this cause filed, doth dismiss the said Plaintiff's action.

Le Demandeur appela de ce jugement, et soumit à la cour que ses allégués étaient suffisamment prouvés par la production de l'acte ; l'Intimé soutenait, au contraire, que le jugement avait été bien rendu : 1° parce que la déclaration alléguait un contrat de vente absolu, et que le document produit ne justifiait pas cet allégué ; 2° parce que ce document prouvait que le contrat était conditionnel, et qu'il n'y avait ni allégué ni preuve que le Défendeur eût jamais été mis en demeure, ou que le Demandeur eût jamais offert de se conformer à la condition y contenue, et que le Demandeur ne l'offrait même pas par son action.

La cour rendit le jugement qui suit (le juge Rolland, différant d'opinion, aurait confirmé le jugement, considérant l'acte mal libellé) :

" The court of Queen's Bench, considering that the instrument in writing declared upon in this cause, notwithstanding the use of contradictory terms and stipulations therein, is, in its character and effect, a deed of sale, and that the same has been legally proved, by reason whereof, the Appellant was entitled to recover the debt or sum of money by him deman-

ded : It is adjudged that the judgment appealed from, be, and the same is hereby reversed, annulled and made void ; and, proceeding to render such judgment in the premises as by the court below ought to have been rendered : It is, further adjudged that the said William Kerr, the Appellant, for the causes, matters and things in his declaration in this cause in the court below set forth, do recover, from and against the said Respondent, the sum of £60, with interest from the 29th day of August 1850 till paid. (1 *D. T. B. C.*, p. 275.)

ROBERTSON A. and G., for Appellant.

KERR W. H., for Respondent.

VENDITIONI-EXPONAS.

COUR SUPÉRIEURE, Montréal, 10 février 1851.

Présents : SMITH, VANFELSON, et MONDELET, Juges.

TALON LESPÉRANCE, Demandeur, *vs.* LANGEVIN, Défendeur, et LANGEVIN, Opposant.

Jugé : Que sur un *venditioni exponas* contre les meubles, il n'est pas nécessaire de faire un procès-verbal de récolement, et on ne peut impugner de nullité ce procédé qui est inutile et n'est pas reconnu par la loi.

Langevin, le Défendeur, fit opposition, le 27 décembre 1850, à l'exécution d'un bref de *venditioni exponas*, émané contre certains meubles saisis, pour cause de nullités détaillées comme suit : parce que Antoine Viger, huissier saisissant, n'a pas fait élection de domicile dans la paroisse où sont domiciliées les parties ; parce qu'il n'a pas déclaré au procès-verbal si les personnes qui ont signé comme recors, étaient les mêmes personnes que celles qui ont agi comme recors ; parce que le Demandeur n'a pas fait élection de domicile par et dans le dit procès-verbal, dans la paroisse ou ville où la saisie-exécution a été faite ; parce que le warrant, en vertu duquel le dit huissier déclarait avoir droit de saisir-récoler, n'est pas signé comme il le dit en son procès-verbal, mais est signé BOSTON & COFFIN (1), et porte des signatures qui ne sont pas celles du shérif de ce district, que la loi ne reconnaît pas sous la raison de Boston & Coffin ; parce que le warrant n'est pas signé de la signature des personnes ayant droit d'agir comme shérif de ce district ; parce que copie de la cédule indiquée au dit procès-verbal, des effets déjà saisis, n'a été laissée ni au Défendeur, ni au gardien ; parce qu'il n'appert pas par le procès-verbal

(1) Le procès-verbal porte que c'est en vertu d'un warrant de John Boston et William Foster Coffin.

que copie d'icelui ait été laissée au gardien en personne, et si avis personnel lui a été donné ; parce que mention n'est pas faite au procès-verbal de la date de la première saisie-exécution ; parce que le dit huissier, n'a pas déclaré en son procès-verbal les noms, surnoms, vocation et le domicile de ses recors, non plus que son propre domicile.

Le Demandeur répondit qu'il n'est pas nécessaire que l'huissier saisissant fasse élection de domicile dans la paroisse où sont domiciliées les parties ; qu'il n'est pas nécessaire qu'il soit déclaré, que les personnes qui ont signé comme recors sont les mêmes que celles qui ont agi comme recors ; qu'il n'est pas nécessaire que le Demandeur fasse élection de domicile dans la paroisse où la saisie a été faite, et qu'il ne paraît pas qu'elle ait été faite dans aucune ville ; que la signature Boston & Coffin est depuis longtemps reconnue par la cour comme celle du shérif ; que la cédule n'est qu'un extrait du procès-verbal de saisie dont le Défendeur, ainsi que le gardien, ont eu copie, laquelle cédule ne contient que l'énumération transcrite au dit procès-verbal de saisie des meubles dont la cour a ordonné la vente, et qu'il n'était pas nécessaire d'en donner d'autre copie que la copie contenue dans le procès-verbal de récolement ; qu'il n'est pas nécessaire de parler au gardien en personne, et qu'avis à son domicile, en son absence, est suffisant ; que la date de la première saisie-exécution est suffisamment établie et fixée par le procès-verbal de saisie ; que l'huissier, a déclaré les noms et surnoms de ses recors, et a élu domicile au lieu voulu par la loi.

MONDELET, juge, *dissentiente*, dit : Que le procès-verbal de récolement est d'un usage immémorial dans le pays, et a toujours eu lieu. Ce mot veut dire vérification de tous les effets saisis. Il est vrai que l'ordonnance de 1667 ne prononce pas la peine de nullité pour les formalités requises, quant au commandement de payer, à la constitution du gardien, et désignation des recors, mais c'est par la raison toute simple qu'elles sont tellement claires qu'il est inutile que la loi en parle, comme le dit Pigeau. Comment fera le shérif, sur l'injonction qui lui est faite de procéder à la vente, s'il ne vérifie pas d'abord que les effets saisis existent ? Cette formalité est donc d'une nécessité absolue, et les formalités ordinaires des saisies doivent y être également observées, suivant l'art. 19 du tit. XXXIII de l'ordonnance.

L'Opposant a établi six nullités dans ce récolement, et l'opposition devrait être en conséquence maintenue.

VANFELSON, juge, en rendant le jugement de la cour, dit : La difficulté ici n'est que dans l'application des principes, il y a eu, en cette cause, une saisie mobiliaire, et la vente a été suspendue par deux oppositions à fin de récréance qui ont été

depuis renvoyées; et il a été donné ordre au shérif de vendre les effets saisis, et le shérif a procédé à faire un récolement des effets en question, dont on argue la nullité. A moins qu'on ne puisse appliquer à ce procédé les règles des saisies, la cour ne peut en prononcer la nullité. Le *writ* ou bref de *vendi-tioni exponas* enjoignait au shérif de vendre après les formalités requises, et la seule question à examiner est celle-ci: le shérif a-t-il procédé suivant le bref et la loi? On ne doit pas suppléer des nullités qui ne se trouvent pas dans la loi.

Il est trop tard actuellement pour discuter la validité de la saisie, sur un ordre de procéder à la vente, et les formalités pour y parvenir doivent seules nous occuper. Ces formalités sont prescrites aux articles 10, 11, 12, 18 et 19 du tit. XXXIII de l'ordonnance de 1667, et il n'y est rien dit du récolement. On trouve cette formalité mentionnée au I vol. de Pigeau, pp. 641 et 642: " La signification de vente étant faite, avant de " vendre, l'huissier procède au récolement des meubles saisis " pour voir s'il n'y en a point de détournés." Mais ce recolement n'est nécessaire qu'entre l'huissier et le gardien, et ne nécessite pas un procès-verbal si tous les effets sont représentés. Mais ici, le procédé adopté par le sherif n'est pas requis par l'ordonnance, et est inutile sous l'ordonnance de 1785, qui indique en la 32e section des procédures différentes. Il est néanmoins du devoir de l'huissier, le jour de la vente, de vérifier si tous les effets saisis sont représentés, et de ce que l'usage s'est introduit de faire un procès-verbal de récolement, il ne s'en suit pas que cet usage puisse autoriser une plainte en nullité, à raison de l'omission de ce procès-verbal ou d'irrégularité en icelui.

JUGEMENT: The court, considering that the said opposition is destitute of foundation, doth dismiss the said opposition. (1 *D. T. B. C.*, p. 279.)

GUGY, pour le Demandeur.

SICOTTE, pour l'Opposant.

PROCEDURE.—INSCRIPTION DE FAUX.

SUPERIOR COURT, Three-Rivers, 9 juin 1851.

Before BOWEN, Chief Justice, MONDELET, and VANFELSON, Justices.

SAMUEL PHILLIPPS, Plaintiff, *vs.* SAMUEL B. HART et al., Defendants, and SAMUEL B. HART, Opposant à fin d'annuler.

Jugé: Qu'un Défendeur qui a produit une requête en inscription de faux et qui ne s'oppose pas à l'inscription au mérite de la cause, renonce

par là virtuellement à toutes prétentions de procéder sur sa requête en inscription de faux.

In this case, an opposition *à fin d'annuler* was filed by Samuel B. Hart, one of the Defendants, because the sheriff's officer had not left with the Opposant, who was the party against whom execution had issued, a copy of the *procès-verbal de saisie*, at the time of the seizure (*sur-le-champ*). On the 8th November last, both parties having declared their *enquête*, as to the opposition *à fin d'annuler*, closed, Plaintiff inscribed the cause for final hearing upon the opposition for the 11th, which inscription was continued to the 12th. But, previously to the parties declaring their *enquête* closed, namely, on the 7th, the Opposant filed a petition for leave to inscribe *en faux*, against the return of the sheriff, in which it was stated that a copy of the *procès-verbal de saisie* had been left with the Defendant S. B. Hart, which the Opposant denied: the motion to file the petition was ordered *nisi* on the 9th, on which day the parties were heard, as well upon that motion as upon a motion for a *commission rogatoire*, and the case was put *en délibéré*. On the 12th, the case was withdrawn by the Opposant from *délibéré*, with the consent of the Plaintiff, and struck from the roll. Plaintiff, on the 3rd day of the present month of June, inscribed the case for hearing *de novo* on the opposition, and the Opposant did not move to set aside that inscription.

"The court held, that, as the *enquête* had been declared closed by both parties, without any reservation on the part of the Opposant as to his petition for leave to inscribe *en faux*, and as the Opposant had not moved to set aside the inscription on the merits of the opposition, he had thereby virtually renounced all pretentions to proceed on his petition *en faux*, and considering that the opposition was unsupported by any evidence whatsoever, it was dismissed." (1 *D. T. B. C.*, p. 305.)

DUMOULIN and DE NIVERVILLE, for Plaintiff.

HART A. E., for Opposant.

PROCEDURE.—DESAVEU.

SUPERIOR COURT, Three-Rivers, 9 juin 1851.

Before BOWEN, Chief Justice, MONDELET, and VANFELSON, Justices.

ADOLPHUS M. HART *vs.* ALEXANDER T. HART.

Jugé: Que celui qui fait une exception en forme de désaveu, doit exprimer que le désaveu est fait par lui-même, aidé de son procureur, ou par son fondé de procuration.

Plaintiff, as attorney *ad lites* of the Defendant in several causes, claimed the sum of £158 - 8 - 3½, for costs and disbursements. Defendant pleaded an exception to the action, in which he set forth that, in several of the causes for which costs and disbursements were claimed, he had never instructed the Plaintiff to sue, and that those actions, though brought in his name, had been, in fact, brought by a third party, and without his (the Defendant's) knowledge. For these reasons, Defendant disavowed Plaintiff as to those actions. Defendant filed a *désaveu*, passed before notaries, in which he, Defendant, personally disavowed Plaintiff as to the first mentioned actions, and gave his attorney in this cause a power of attorney to take the necessary steps, but no mention of it was made in the exception. The court held that the exception should express that the *désaveu* was made either by the Defendant personally, with the aid of his attorney, or by his *fondé de procuration*, and that it must be apparent on the face of the exception itself.

That part of the exception was therefore dismissed, and the parties ordered to proceed to evidence on the other allegations. (1 *D. T. B. C.*, p. 307.)

HART A. E., for Plaintiff.

POLETTE, for Defendant.

PREUVE.—ENQUETE.

SUPERIOR COURT, Quebec, 28 avril 1851.

Before DUVAL and MEREDITH, Justices.

PEMBERTON et al. *vs.* DEMERS.

Dans une action portée par un curateur à la succession vacante d'un individu décédé, l'enfilure de l'acte de curatelle sera preuve suffisante du décès de la partie, particulièrement si le Défendeur n'a pas expressément nié les qualités prises par le Demandeur, ou le fait de la mort de la partie décédée. (1)

This was an action of *assumpsit*, brought by George Pemberton, Henry Pemberton as well in his own name as in his quality of curator to the vacant estate of the late William Pemberton, deceased, and Joseph Bremner Provan, all heretofore merchants and copartners. The declaration alleged, that, subsequently to the execution of the contract declared upon, to wit, in the month of September, one thousand eight hundred and forty-four, at Paris, in the kingdom of France,

(1) V. art. 144 C. P. C.

William Pemberton had departed this life. Plaintiffs, at *enquête*, only filed the *acte* of curatorship, by which Henry Pemberton was appointed curator to the vacant estate of the late William Pemberton, deceased, no *extrait mortuaire* was filed.

Upon the hearing of the cause finally, upon the merits, it was urged, on behalf of Defendant, that there was no sufficient or legal evidence of the death of William Pemberton, inasmuch as Plaintiffs had omitted to file an *extrait mortuaire* or certificate of burial of the said William Pemberton, and had not supplied that omission by any other evidence. It was answered, that Defendant had merely filed an ordinary defense *au fonds en fait*, with a perpetual exception and that, he, Defendant, not having expressly denied the allegation of fact, that Henry Pemberton was the curator duly appointed to the vacant estate and succession of the said William Pemberton, who had departed this life, such allegation was to be held as having been admitted by him, (1) and, moreover, that the filing of the *acte* of curatorship, which was an authentic instrument, was sufficient evidence of the fact of the death of William Pemberton. Judgment for Plaintiffs. (1 *D. T. B. C.*, p. 308.)

BURROUGHS and TACHÉ, for Plaintiffs.

MAGUIRE, for Defendant.

RESPONSABILITE.—VAISSEAU.—CONNAISSEMENT.

COURT OF QUEEN'S BENCH, Quebec, 5 avril 1849.

Before Sir JAMES STUART, Chief Justice, and BOWEN, Justice.

GORDON et al. *vs.* POLLOCK.

Jugé: Qu'un fréteur ne peut procéder par voie de revendication, comme dans le cas d'une détention injuste, contre un maître de vaisseau, quand il y a difficulté entre eux quant à la quantité des effets mis à bord, et aux connaissements à signer. (2)

Quant à la responsabilité des vaisseaux par rapport à des effets chargés sur des berges ou allèges au port d'embarquement et de départ à un autre port pour les mettre à portée de passer sur des bas-fonds.

This was an action of revendication, by which Plaintiffs sought to recover from Defendant the quantity of 457 barrels

(1) 13 and 14 Vic., ch. XXXVIII, sec. 85: "And be it enacted, that in any pleading in any contested civil case, every allegation of fact, the truth of which the opposite party shall not expressly deny or declare to be unknown to him, shall be held to be admitted by him."

(2) V. art. 2424 C. C.

of flour, alleged to have been unlawfully detained by him, and by which they had caused a certain quantity of flour by them shipped on board the bark *Jemima*, Pollock master, to be seized and attached as their own property, and as having fallen into the hands of the Defendant, who unlawfully detained the same. To this action, Defendant pleaded that, as master of the bark *Jemima*, he had received on board of her 437 barrels of flour only, under a contract of affreightment between the Plaintiffs and one T. C. Lee, the owner of the *Jemima*, to convey them from Montreal to some port in England; and that he had signed and tendered to Plaintiffs a bill of lading for that quantity, which had been refused by them in the first instance, their pretension being that they were entitled to a bill of lading for 457 barrels of flour. Defendant alleged moreover that the bill of lading for 437 barrels had since been left with, and was now in the possession of Plaintiffs.

The whole difficulty between the parties had arisen in consequence of the discrepancy in the number of barrels, Defendant pretenting that he had received 20 barrels less than Plaintiffs wanted to make him responsible for by the bill of lading.

On the adduction of evidence, it was ascertained, that part only of the flour in question had been shipped at Montreal, on board of the *Jemima*, and that the remainder had been sent to Quebec by the barge *Scotland*, described as a ship tender, to be delivered there on board of the said bark *Jemima*. The bills of lading, relating to that portion of the flour, were signed by Gilmour & Co., the owners of the barge, and contained the following undertaking, " to be delivered on board of the *Jemima*, at the port of Quebec, or of any other vessel to be pointed out by Thomas Gordon." It appeared that the error, in relation to the 20 barrels missing, had taken place on board of the barge *Scotland*, and that these 20 barrels never reached the *Jemima*: so ran the bulk of the evidence. Under these circumstances, the pretentions of Plaintiffs were, that, inasmuch as the barge *Scotland* was a ship tender, and that the freight earned by her between Quebec and Montreal, was to be deducted from the freight of the *Jemima*, and the Defendant made, in effect, to pay such freight, he was responsible for the flour shipped at Montreal on board the said barge. It was urged by Defendant, that his liability only began upon the transhipment of the flour from the barge *Scotland* on board of the *Jemima*; that, until then, Plaintiffs had made it their own business, had hired the barge, accepted the bills of lading of Gilmour & Co., and had kept the cargo so much under their own control, that one of the conditions

in the bills of lading, as stated before, was : " To be delivered on board the *Jemima*, at the port of Quebec, or of any other vessel to be pointed out by Thomas Gordon " (one of the Plaintiffs).

The questions submitted by the parties to the court were the following : 1° was the Defendant, under the circumstances of the case, responsible for the barge *Scotland*, as a ship tender ? 2° If so, and if the tender of the bill of lading for 437 barrels only, be insufficient, was the remedy of Plaintiffs, by process of revendication, the proper one, and, if not, what other remedy ought they to have exercised ?

On the first point, it was established, by mercantile men, that the ship or vessel must be responsible for the lighters and ship tenders, when the cargo is transferred from the ship into the lighters and tenders, and, not so, when the lighters or tenders are hired or freighted by wharfingers to convey goods on board of a ship laying in the stream. In support of this distinction, the Defendant cited Abbott, on Shipping, p. 222, s. 3, who says : " The manner of taking goods on board, and the commencement of the master's duty in this respect, depend on the custom of the particular place. More or less, it is to be done by wharfingers or lightermen, according to the usage. If the master receive goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt." From which it must be inferred that if he receive them on board, his responsibility commences there only (1). A similar doctrine is also to be found in 5th Espinasse, *N. P. C.*, pp. 41, 42, 43.

On the second point, the Defendant cited Abbott, on Shipping, p. 216, sec. 4, who says : " If there is any dispute about the quantity or condition of the goods, or, if the contents of the casks or bales are unknown, the words of the bill of lading should be varied accordingly." Valin, *Commentaire sur l'ordonnance de la marine*, vol. I, p. 635, says : " Le refus du " maître de signer le connaissement, ne pouvant qu'être injuste, " il y aurait action contre lui pour l'obliger de signer les con- " naissements, et pour faire ordonner que, faute par lui de " signer, le jugement qui l'y condamnerait vaudrait signature." From these citations and authorities, it would appear that the remedy of the affreighters would be by action to compel the master to sign bills of lading, and execute his part of the contract of affreightment, and not by an action of revendication or trover, which would suppose that the master had obtained an unlawful possession of the goods, which was not the case.

(1) Molloy, book II, ch. II, sec. 2.

The court adopted this view of the case, and dismissed the action of the Plaintiffs.

JUDGMENT: The court, considering that it has not been proved or established, by Plaintiff, that the flour mentioned in their declaration, and therein and thereby demanded, came into the possession of the Defendant in the manner set forth in the said declaration ; but that, on the contrary, it is established, that the said flour, or so much thereof as came into the hands of the Defendant, was by Plaintiffs shipped and delivered to Defendant, under a certain contract of affreightment, for the conveyance of the said flour to Liverpool in Great Britain, which contract, at the time of the institution of this action, was unexecuted, and in full force ; and considering also that it is not established by Plaintiffs that, at the time of the institution of this action, Defendant wrongfully detained said flour from Plaintiffs, but, on the contrary, it is established, that there was no wrongful detention of the flour in question, by Defendant from Plaintiffs, the same being held by Defendant under said contract, and the bailment thereof as aforesaid ; and considering, therefore, that said action of Plaintiffs is altogether without foundation in fact and in law : It is adjudged that the said action be, and the same is hereby dismissed. (1 *D. T. B. C.*, p. 313.)

STUART A., for Plaintiffs.

LELIÈVRE and ANGERS, for Defendant.

CERTIORARI.

COUR SUPÉRIEURE, Québec, 16 juin 1851.

Présents : DUVAL et MEREDITH, Juges.

LA REINE *vs.* ANTOINE BARBEAU, Requérant, et J.-BTE BARBEAU, Poursuivant, et Défendeur sur writ de certiorari.

Le writ de *certiorari* qui émane sous les dispositions de la 12e Vic., ch.XLI, doit être adressé au juge de paix qui a prononcé la conviction, et non à l'huissier qui fait signification du dit writ. Un tel writ, adressé à un huissier, est nul et sera mis au néant.

Antoine Barbeau avait été poursuivi par Jean-Baptiste Barbeau, devant un juge de paix de ce district, pour avoir passé sur la terre du dit J. B. Barbeau, et, par le jugement rendu, Antoine Barbeau avait été condamné au paiement d'une amende et d'une certaine somme, par forme de dommages.

Antoine Barbeau se croyant lésé par ce jugement, présenta

une requête, pour obtenir un writ de *certiorari*, (1) afin de soumettre la procédure à la revision de la Cour Supérieure.

Ce writ émana le 15 janvier 1850, adressé " à aucun des " huissiers de la Cour Supérieure pour le district de Québec."

Sur le rapport du writ, il fut fait motion par Jean-Baptiste Barbeau que le writ fût cassé, parce qu'il était adressé à un huissier, et non pas au juge de paix qui avait prononcé la conviction dont Antoine Barbeau se plaignait.

DUVAL, juge, lors de la reddition du jugement, dit que le writ de *certiorari* en cette cause devait être adressé au juge de paix qui avait prononcé le jugement. L'objection qu'il était adressé à un huissier, était fatale.

JUGEMENT: Il est ordonné que le writ soit mis de côté (*superseded.*) (1 *D. T. B. C.*, p, 320.)

BELLEAU, pour Ant. Barbeau.

TASCHEREAU, J. T., pour Jean-Bte Barbeau.

MARGUILLIER EN CHARGE.—FABRIQUE.

COUR SUPÉRIEURE, Montreal, 4 mars 1851.

Présents: SMITH, VANFELSON, et MONDELET, Juges.

ALEXIS TAILLEFER, ès qualité, *vs.* LOUIS BÉLANGER.

Le marguillier en charge a seul le droit de recevoir les rentes et deniers dus à la fabrique: la nomination par les anciens marguilliers d'un procureur fabricien jugée illégale; et injonction faite au fabricien ainsi constitué procureur de s'abstenir de ses fonctions.

Cette action fut commencée par une requête libellée, en vertu de la 12e Vic., ch. XLI, demandant un writ de la nature d'un writ de *quo warranto*, contre une personne entrant dans l'office de marguillier en charge de l'œuvre et fabrique de la paroisse de St-Martin. Le Demandeur, par sa requête, alléguait que, le 1er janvier 1850, il avait été nommé marguillier en charge de la paroisse de St-Martin, conformément à la loi et à l'usage suivi dans cette paroisse, et s'était, en conséquence, chargé de cet emploi; que, parmi les devoirs compris dans l'administration générale de l'œuvre et fabrique de la paroisse et que la loi lui imposait, était celui de faire collection et de poursuivre le recouvrement des sommes dues à la dite œuvre et fabrique; que, depuis la nomination du Demandeur à cet office, le Défendeur avait constamment persisté à l'entraver dans l'exécution des devoirs du dit office, et ne cessait d'en agir ainsi; il procédait ensuite à détailler

(1) 12 Vic., ch. XLI.

les actes d'agression dont il se plaignait. Il concluait à ce qu'il émanât un writ sommant le dit Louis Bélanger de comparaître, pour voir déclarer le dit Requérant marguillier en charge de la paroisse de St-Martin et en la possession légale du dit office ; que lui, le Défendeur, n'avait aucun droit à la gestion des affaires, non plus qu'à l'administration des deniers de la dite fabrique ; qu'il fut en conséquence expulsé du dit office de marguillier en charge, dont il avait usurpé les droits et dont il détenait illégalement la possession, et qu'il lui fut fait défense de récidiver à l'avenir.

Le Défendeur plaida au fonds par une exception péremptoire, niant l'usurpation, et citant la coutume qui existait dans la paroisse (en conséquence de la multiplicité des affaires de la fabrique et du désavantage qui avait résulté de ce que l'on avait laissé la conduite des affaires aux marguilliers comptables, qui, souvent, n'avaient pas les connaissances nécessaires ni le loisir pour tenir les comptes) de nommer une personne pour tenir les comptes de la fabrique et faire collection des sommes qui lui étaient dues, et qui était aussi autorisée spécialement à agir comme procureur de la fabrique. Que, depuis le mois d'août 1845, le Défendeur avait été engagé par le curé et les anciens et nouveaux marguilliers de la paroisse pour remplir ces devoirs, et avait continué de les remplir sans dépasser les limites de son mandat.

Le Requérant pour soutenir la position qu'il avait prise, allégua les raisons suivantes, que les actes allégués par le Défendeur étaient illégaux ; que la coutume invoquée par le Défendeur était une coutume illégale, et ne pouvait affecter les droits du Requérant, qui n'y avait point donné son consentement, et qui était la personne responsable pour la tenue des comptes de la fabrique ; que l'incapacité relative des marguilliers comptables, n'était pas une raison de les déchoir de leurs droits, et ne donnait pas au conseil de fabrique le droit d'exercer les pouvoirs de marguilliers comptables, ni, par conséquent, le droit de déléguer ces pouvoirs à d'autres ; que l'autorisation, donnée au Défendeur, le 3 août 1845, pour tenir les comptes des marguilliers comptables, ne transférait aucun droit valide, et n'avait aucun effet continu.

La cour, rendit jugement, le 2 septembre 1850, renvoyant les réponses en droit sur le principe que les matières alléguées étaient des matières de fait, qui ne pouvaient se soulever dans ce moment, et que la réponse du Défendeur, qu'il n'avait pas fait acte d'intrusion était suffisante.

Les parties procédèrent à l'enquête. De la part du Demandeur, on appela plusieurs témoins qui prouvèrent sa nomination comme marguillier en charge, selon son rang d'ancienneté, et conformément à l'usage de la paroisse de St-Martin ; que, le

1er janvier 1850, il prit possession du dit office, et se trouvait en droit de le retenir jusqu'à l'expiration de l'année ; que, peu de jours après s'être installé dans sa charge, il fit annoncer à l'issue du service divin du matin, un jour de dimanche, qu'il avait intention de remplir tous les devoirs de la charge, et notifia les paroissiens de s'adresser à lui dans toutes les affaires concernant la fabrique, et, surtout, dans les affaires où il s'agissait du paiement d'aucune dette ; que, peu d'instants après, Léandre Decelles, un des crieurs de la paroisse, lut un écrit, par lequel il notifiait les paroissiens de ne pas payer au marguillier en charge, mais au Défendeur, et que ceux qui auraient payé au Demandeur seraient forcés de payer une seconde fois ; que le Défendeur avait institué plusieurs actions pour le recouvrement de sommes dues à la fabrique, et qu'il avait persisté à le faire, contre le gré et malgré les désaveux du Requérant ; que, de plus, dans les actions portées par le Demandeur comme marguillier en charge, dans la Cour des Commissaires à Ste-Rose, le Défendeur avait comparu, et, au nom de la fabrique, avait nié son autorité, et avait réussi à faire renvoyer les actions, et avait retiré de l'argent de quelques personnes qui avaient déjà payé au Demandeur. Sur les transquestions, ces témoins reconnurent que le Défendeur, pendant plusieurs années, avait, comme procureur de la fabrique, perçu les arrérages qui lui étaient dus, sans qu'aucune difficulté ne se fût élevée sur ce point.

Depuis quatre années, l'élection du marguillier en charge s'était faite par toute la paroisse, au lieu qu'avant ce temps, cet officier était toujours élu par les anciens marguilliers.

De la part de la défense, on appela plusieurs témoins qui prouvèrent qu'en 1845, selon la coutume dans la paroisse, le Défendeur avait été nommé procureur de la fabrique, par les anciens et nouveaux marguilliers, pour percevoir les sommes dues à la dite fabrique ; qu'il n'avait jamais prétendu être le marguillier en charge, mais seulement le procureur de la fabrique ; qu'il demeurait près de l'église, tandis que le Demandeur résidait à une distance de plus d'une lieue ; que ce dernier ne pouvait ni lire ni écrire, et que le Défendeur était une des personnes instruites de la paroisse.

Ce ne fut qu'en 1845 qu'on appela les notables de la paroisse pour voter à l'élection d'un marguillier ; avant ce temps, on n'avait jamais eu un procureur fabricien, le curé ayant rempli les devoirs de cet officier ; tout allait bien jusqu'au temps où l'élection se fit par les paroissiens, mais depuis environ deux ans, on avait formé deux partis, les anciens marguilliers d'un côté, et les nouveaux marguilliers de l'autre, c'est-à-dire les marguilliers qui avaient été élus par les paroissiens ; les anciens marguilliers avaient nommé le Défendeur, contre la

volonté des nouveaux ; le Défendeur agissait comme secrétaire-trésorier et non comme marguillier ; il n'avait reçu que les arrérages, et avait refusé de recevoir les sommes dues pour l'année courante ; il avait été élu à une assemblée des anciens et des nouveaux marguilliers, et l'acte d'engagement par lequel il avait été nommé, avait été passé devant notaires. Le Défendeur fila cet acte d'engagement, avec les extraits des registres de la fabrique, qui prouvaient que, même depuis 1787, les marguilliers avaient coutume de nommer un procureur, pour gérer les affaires spéciales de la fabrique.

SMITH, juge : Le Demandeur se plaint de ce que le Défendeur s'est immiscé dans l'office de marguillier en charge de la paroisse de St-Martin, et allègue les faits dont il se plaint. Le Défendeur a plaidé une procuration de la part des anciens marguilliers. Les questions soumises à la considération de la cour sont : 1° n'y avait-il pas intrusion de la part du Défendeur ; et, s'il y avait intrusion, l'autorité que l'on invoque pour la soutenir, est-elle une autorité suffisante ? La cour n'a aucun doute que les actes dénoncés ne soient ceux que le marguillier en charge est appelé à accomplir. La fonction d'un marguillier en charge, si elle signifie quelque chose, ne signifie pas simplement que le marguillier pourra prétendre à certains droits honorifiques : elle lui donne le droit d'administrer les affaires temporelles de l'église. La cour est donc d'opinion que les droits du marguillier en charge sont convenablement définis par le Demandeur, et que les faits dont il se plaint étant des actes dont il était lui-même tenu, l'usurpation, de la part de qui que ce soit, du droit de les accomplir, est une usurpation de l'office de marguillier, tel que la loi le suppose. Puis vient la question de savoir si les anciens marguilliers avaient le droit d'accorder le pouvoir donné au Défendeur pour agir comme procureur fabricien. Ce pouvoir dérive de la paroisse entière, et il ne saurait être exercé par une partie des paroissiens. Ici, l'engagement entre les anciens marguilliers et le Défendeur date de l'année 1845, et la cour est d'opinion qu'un pareil arrangement ne peut infirmer l'autorité légale du marguillier en charge qui tient son autorité de la paroisse entière.

MONDELET, juge : Dans ce pays, il n'y a point, comme en France, de bureau ordinaire composé des anciens marguilliers, et la prétention du curé et des anciens marguilliers de nommer le Défendeur, est un pur acte d'usurpation.

JUGEMENT : " Considérant que le Demandeur a légalement établi qu'il y avait intrusion de la part du Défendeur, en par ce dernier remplissant les devoirs du Demandeur, comme marguillier en charge de l'œuvre et fabrique de St-Martin, et en autant que le Défendeur, sans aucune autorité suffisante, s'est immiscé illégalement dans la dite charge, et a usurpé les droits

du Demandeur, en prenant sur lui la gestion des affaires temporelles de l'œuvre et fabrique de St-Martin ; et, vu aussi que le Défendeur prétend avoir, lui seul, l'autorité exclusive de recevoir les argents dus à la dite fabrique, et d'en avoir l'administration, laquelle autorité, en loi, appartient exclusivement au Demandeur, comme marguillier en charge de la dite fabrique, et comme procureur fabricien de la dite corporation, en vertu de la loi ; considérant aussi, que le pouvoir réclamé par le Défendeur se fonde sur un acte d'arrangement, fait entre les anciens et nouveaux marguilliers de la dite paroisse de St-Martin, et le Défendeur, en date du 8 août 1845, et invoqué par lui dans son plaidoyer, lequel acte est illégal, vu que les anciens et nouveaux marguilliers n'avaient pas le droit de faire un tel arrangement, la cour déclare que les dits actes d'administration, de la part du Défendeur, sont des actes d'intrusion et d'usurpation sur les droits du marguillier en charge, et ordonne que le Défendeur soit démis et exclu de la dite charge, et qu'il lui soit fait défense d'en exercer les droits, et ordonne de plus que le Défendeur s'abstienne, dès à présent, de s'immiscer dans la dite charge et de remplir les devoirs de marguillier en charge de l'œuvre et fabrique de St-Martin. (1 *D. T. B. C.*, p. 322.)

DE BLEURY & DEROME, pour le Demandeur.

CHERRIER & DORION, pour le Défendeur.

OFFICIERS DE VOIRIE.—TRANSPORT.

SUPERIOR COURT, Montreal, 21 May, 1851.

Before DAY, SMITH, and VANFELSON, Justices.

JOSEPH ELLISON *vs.* THOMAS DUNN.

Jugé : Que le cessionnaire d'un officier de la voirie peut intenter une action contre un propriétaire absent, pour recouvrement du coût d'un chemin sur les terres de ce propriétaire. (1)

This was an action brought under the Act 13th and 14th Vic., ch. XLI, against an absent proprietor of wild lands, to recover the value of work done on a public road.

The declaration alleged the appointment of commissioner and surveyor of roads, for the township of Dunham, under the acts 2 Will. IV and 2 Vic., and the making of a road, through the sixth and seventh ranges of the said township by the Plaintiff, acting under the directions of the said road

(1) V. art. 397 et 398 C. M.

officers, and by virtue of a *procès-verbal* dated 18th July, 1834; that part of the land through which the road ran at that time, belonged to Honorable Thos. Duun, the original grantee of the Crown, but had since devolved to Defendant, who was the legal representative of Honorable Thos. Dunn; that the cost incurred in making said road had never been paid; but that, by acts of transfer since passed, and which the Plaintiff specially set up, the road officers of the township of Dunham had assigned their rights to recover the said sum of money, to Plaintiff, who was entitled to have the same of the Defendant: conclusion for £349-10-0 principal, damages, and interest.

HENRY STUART, for Defendant, contended: 1° That no action could be maintained at common law for road labor; 2° That the statutes directing the opening of roads on certain conditions, also established the mode of recovering the amount expended for the same, and that the form of proceeding for such recovery, was imperative, and could not be altered at the choice or caprice of the party pretending to be aggrieved; 3° That the action, by the statutes, was given to the road commissioners, and their successors in office, and that no legal assignment of such claim could be made to Ellison, by any road commissioner then in office. The law having, for prudent considerations, not given the action to the party who performed the work, upon a certificate of the road commissioner, but given the action itself to a public officer, and his successors in office.

SMITH, Justice: The old statutes in this province made no provision for the construction of roads through wild lands by absent proprietors, and the statutes cited (2 Will. IV and 2 Vic.) were passed to remedy that defect. Under these statutes the only legal remedy was by the public officer, who could not assign his claim. I hold, therefore, the assignment in this cace to be null. Until there has been a judgment declaring that the debt has been created in compliance with the requisite formalities, there can be no debt to assign. The reference to assignees in the late statute 13th and 14th Victoria, establishes nothing on this point. It does not make such an assignment valid, the preceding law not having given the right to assign. It leaves the parties in the same position as they were before. I am, therefore, of opinion that the action should be dismissed.

DAY, Justice, giving the judgment of the court, said: I do not agree with my learned brother, that the action is based on the two statutes cited, and that if they fail, the action must also fail. The declaration does not state under what statute the work was done. All that appears is, that the Defendant being absent, and the Plaintiff having expended money in

making the road, all parties combined in assigning their rights to him. Now, by the Act 36th Geo. III, ch. IX, it was provided that when parties are absent, roads may be made through their land at their expense, and an action, is given to the public officer to recover the amount. The present action, therefore, is not based on the two statutes cited, which only give an hypothecary right. Then, a right to recover existing against an absent proprietor, is there any thing to prevent the public officer from assigning his right to the Plaintiff? The debt existed from the moment the work was completed, and the only question is, whether there is any thing in the character of a public officer which prevents the assignment from taking place. I cannot see that there is. It is true that the statute 13th and 14th Vic., confers no new right of assignment on the public officer; it enacts nothing; but it recognises the rights of the assignee, and taking that with the general principle, I am of opinion the demurrer should be dismissed.

VANFELSON, Justice: I agree in the view taken by the learned judge (DAY). The law of France is essentially different from that of England, in respect to the assignment of *choses* in action, and I can see no reason why the rights invoked in this case are not assignable. Demurrer dismissed. (1 *D. T. B. C.*, p. 340.)

GUGY, for Plaintiff.

STUART H., for Defendant.

RESPONSABILITE.—ENTREPRENEUR.

SUPERIOR COURT, Montreal, 17 juin 1851.

Before DAY, VANFELSON, and MONDELET, Justices.

DAVID BROWN, Plaintiff and incid. Defendant, and WM. LAURIE, Defendant and incid. Plaintiff.

Jugé: Qu'un constructeur qui a bâti sept maisons, dont trois se sont écroulées ou ont dû être démolies, est responsable des vices du sol, nonobstant que les excavations aient été faites suivant les plans et devis et sous la direction d'un architecte employé par le propriétaire. (1)

This was an action brought by a builder, to recover the sum of £389-1-6, balance due on a contract sous seing privé, for the erection, according to plans and specifications, of seven houses, and for *extra* work.

The Plaintiff filed as exhibits: 1° copy of contract of 9th February, 1843, which refers to specifications and drawings

(1) V. art. 1688 C. C.

to be followed, and speaks of an architect in charge; 2° certificate of 10th August, 1843, by Footner, the architect in charge, as to the performance of work:

The Defendant, by his plea and incidental demand, set up the contract of 9th February, 1843, and then went on to allege that Plaintiff, not regarding his legal liability as master mason, did not excavate skilfully the foundations, more particularly those of the three center houses, but laid the said foundations on a soft substance, so that the walls, when partly built, gave way, and had to be taken down and rebuilt at a cost of £330; that Plaintiff was, by law, answerable for this, and that Defendant had suffered loss in consequence: 1° of the £330 before mentioned; 2° of £500, on account of damage done to the whole row; 3° of £210 for loss of rent by delay in finishing houses, and 4° of £50 for payments to other contractors for loss of time, in all, £1250, for which sum he prayed judgment against Plaintiff.

To these pleas, Plaintiff filed special answers, in which he alleged that the contract bound him to the specifications, plans and drawings, and placed him under the direction of an architect in charge; that the depth of the excavation had been particularly marked out on said plans and drawings, and had been executed exactly as thereby required; that, when the excavation had been so made, a stratum of sand and clay had been found, which had been carefully examined by Defendant and by Footner, the architect in charge, and by them declared sufficient; that thereupon the foundations had been laid; that it was true the three centre houses had sunk a little more than was usual, which was caused by a mossy earth under the sand and clay of which there was no indication; but that there had been no want of skill on the part of Plaintiff, who had acted in accordance with the contract and the special orders of Defendant; that, moreover, the demolition of the walls had not been required, inasmuch as the defect could have been remedied without it, at an expense of less than £50, and that Plaintiff could not be held liable for it.

Defendant filed the contract of the 9th February, 1843, with the specifications therein referred to, and working plans of the buildings.

At the hearing on the merits counsel for Defendant laid down three propositions: 1° that Plaintiff was responsible for the *vices du sol;* 2° that negligence and want of skill had been proved; 3° that the building was at Plaintiff's risk till delivered.

The following authorities were cited by the parties: Domat, L. C., liv. I, tit. IV, s. 8; Pothier, *Oblig.*, n° 163; Pothier, *Louage*, n° 425, 426; *Louisiana Code*, art. 2733; *Ancien*

Dénizart, verbo *bâtiment*, p. 302 ; *Nouv. Dénizart*, verbo *bâtiment*, s. 7, p. 312 ; *Guyot*, verbo *architecte*, pp. 580, 581 ; *Ibid.*, verbo *bâtiment*, p. 231 ; *Ibid.*, verbo *maçonnerie*, pp. 51, 64, 65 ; Desgodets, pp. 273, 580 ; *Roger et Ridlez*, verbo *architecte*, pp. 268 *et seq.* ; Riffe-Caubray, *Pandectes fran.*, 1805 ; Historique of article 1792 of Code Civil ; 17 Duranton, n° 255, p. 248 ; 4 Duvergier, n° 350, p. 402 ; 3 Delvincourt, p. 118 ; 9 Troplong, n° 818, p. 46, no 993, p. 213 *et seq.* ; Frény Ligneville, *Code des architectes*, 1837, ch. XVIII, sec. 1, p. 286 ; Lepage, *Lois des bâtiments* ; 2 Nouveau Desgodets, p. 26 *et seq.*

DAY, Justice : This is an action brought upon a contract by the builder of certain houses, against their proprietor, to recover the sum of £389 - 1 - 6, the balance remaining due under the contract, and some small additional sums for *extra* work. There is no contest as to the contract and balance due, but the Defendant has set up, by exception, and also by an incidental demand, a claim for damages, because, as he alleges, three of the houses were placed on an insufficient foundation, and sunk, and it became necessary to reconstruct them ; in consequence of which he has sustained damage exceeding the amount due under the contract. On this, the Plaintiff took issue by answering specially that the houses in question had been erected under the provisions of the contract, in accordance with the plans and specifications, and under the superintendence and directions of the Plaintiff's architect, and that he was not, therefore, liable for these damages. There was an architect, who drew the plans and superintended the construction of the buildings ; it has been sufficiently shewn that proper precautions have not been taken to ascertain the nature of the ground by probing or otherwise, but that taking it for granted that the soil was all of the same character, there has been an omission to ascertain the fact in the way that it ought to have been ascertained. The facts of the case are simply these. The Plaintiff undertook to build seven houses in a row, at the request of the Defendant. The soil on which these houses were to be built, was a description of clay and sand mixed. Four of the houses seem to have had a sufficient foundation, but in the middle of the row was the site of an old water course or swamp, covered over with a coating of sand, and it became necessary to go six or seven feet deeper before a sufficient foundation could be found. The parties engaged in the building, taking it for granted that all was right, built the seven houses all on the same foundation, and the consequence was that the walls sunk, and had to be taken down to prevent them from falling. Now, whether the the precautions, which it was the duty of the parties engaged

to take, in order to satisfy themselves of the nature of the soil before proceeding to build, have been taken, is a matter of evidence to be determined by those conversant with these matters, and on looking at the evidence adduced, the court are satisfied that these parties have not done so. Three experienced persons who have been called to speak to this point, swear that it was imprudent to build without first sounding and ascertaining what stratum was beneath, and that they are of opinion that sufficient precaution has not been taken, and that there was neglect. Then comes the question as to the rule of law: 1° whether, under the law of the country, the warranty of the builder to adapt his foundation to the nature of the soil on which he is building, and to indemnify the proprietor, in case the building prove unsound is presumed, although nothing is said on the subject at the time of the contract. On this point, the court are with the Defendant: the whole tenor of the decisions in France, based upon texts of the Roman law (which latter, however, are only applicable to public buildings), establishes the liability of the builder. The reason of this arises from the presumption that the proprietor is unskilled in these matters, and that then he goes to the builder he has a right to expect that he will make such a foundation as that the houses erected on it will stand. There is besides a motive of public policy which would subject the builder to this risk, and renders it necessary that he should take extreme care in the construction of buildings. It arises from the fact that the lives of persons inhabiting the houses, and of passers by, are endangered by the falling. In France, the builder was held to guarantee the building for ten years, and the same rule will necessarily prevail here. This warranty is equally binding whether the destruction or damage of the building arise from the builder's carelessness in the erection of it, or from putting it upon an unsound foundation. On looking through the books, anterior to the Code Napoleon, the court does not find any express warranty for what was called, in that code, *vices du sol*, but the expression invariably made use of is that the builder was bound to warrant the solidity of the building: this, of course, he could not do unless he warranted the solidity of the foundation, and, therefore the one warranty must be held to include the other, and this liability of the builder is not affected by the fact, that his work was done in conformity with his contract and the specifications furnished him. Then, as to the other question, whether the employment of an architect by the Defendant under whose directions the Plaintiff worked, relieves him from liability? This is the most favorable aspect of the case for the Plaintiff, because if the proprietor chose to

employ a skilled party like an architect to look after his interests, it seems only reasonable that the builder should be relieved from liability: but here again the law is against him, and holds him liable jointly and severally with the architect. On looking under the word *architecte* in the *Répertoire*, a case will be found where this principle was directly maintained, and though, at first sight, such a rule may seem to sin against the equity of contracts, yet such is the importance of guarding life and property, that the court are not disposed to say that the rule goes beyond the strict bounds of reason. On these grounds, therefore, the court are of opinion that the liability of the builder is not diminished by his acting under the instructions of an architect. It was his business to see that all necessary precautions were taken, and if he did not do this, and the buildings proved unsound, he must be held liable for the consequences: then all that remains to be done, is to settle the quantum of damages. In respect to the £330 for the reconstruction of the walls, there is no dispute on that point, and the Defendant is entitled to recover that amount; but then he sets up other damages: 1° that the houses are materially diminished in value in consequence of taking down the walls, and that they are not worth so much as if the work had been well done at first for this, he claims £500; 2° that in consequence of their not being finished the 1st November, he has missed the opportunity of letting them, and has lost rent to the amount of £200; in regard to the loss of rent, the evidence is inconclusive, it not appearing that any application has been made to lease the houses, or that the Defendant has lost the opportunity of letting them. Therefore, no case is made out; but, as regards the diminution of value, there is some evidence, the witnesses fixing it at from £150 to £200. The court will take the minimum sum, and award £150 on this ground to Defendant, thus more than covering Plaintiff's claim, whose action is therefore dismissed, and Defendant will have judgment on his incidental demand, for the balance.

MONDELET, Justice, observed: That the fact of an architect being associated with the builder does not destroy or lessen the responsibility of the latter, who is not bound to follow blindly the instructions of the architect, unless they are consistent with the safety of the work.

JUDGMENT: Considering that Defendant hath established the material allegations in the exception by him filed, and more especially that, previously to the construction of the three houses in the said exception specified, the proper and usual examination and precautions were not had or taken for ascertaining the nature of the ground whereupon the same

were built, and that the foundation of the said three houses was not constructed in a manner adapted to the nature of the said ground, or sufficient for the support and solidity of the said three houses, by reason whereof it became necessary to demolish and reconstruct the walls of the said three houses, in the manner and to the extent in the said exception alleged and that the Defendant incurred and suffered loss and damage thereby, that is to say : in the sum of £330 by him paid for the demolition and reconstruction of the said walls, and in the further sum of £150 for the diminution in value of the said three houses, making together the sum of £480, which exceeds the sum of money by the Plaintiff alleged to have become due to him for the causes in his declaration set forth and remaining unpaid, to wit, the sum of £389-1-6 ; and further, considering, that, although Plaintiff did construct and build said foundation and houses in conformity with the plans and specifications, according to which he was bound to construct and build the same, and that an architect was charged with the superintendence of the said building and construction, nevertheless, Plaintiff, by reason of his omission and neglect to use and take the usual and proper means and precautions, for ascertaining the nature of the ground, and for rendering the said foundation fit and sufficient to secure the support and solidity of the said three houses, and by law, is liable to warrant and indemnity Defendant for the said loss and damage so by him incurred and suffered as aforesaid, doth maintain the said exception of Defendant and dismiss Plaintiff's action ; and the court, proceeding to adjudge upon said incidental demand, doth condemn incidental Defendant to pay incidental Plaintiff, for his damage, the sum of £90-18-6, with interest."

Cette cause fut portée en appel, et la Cour d'Appel, ROLLAND, J., PANET, J., et AYLWIN, J., a, le 10 mai 1854, confirmé le jugement de la Cour Supérieure.

ROLLAND, juge : Il est important d'établir une règle certaine pour les architectes et constructeurs, dans l'exécution des ouvrages qui leur sont confiés. Il s'agit dans la présente cause de déterminer jusqu'où s'étend la responsabilité de l'architecte ou du constructeur, et s'ils sont tenus des dommages qui peuvent résulter des vices du sol. En France la législation nouvelle a établi des règles précises pour décider les questions qui peuvent s'élever sur ce point ; mais ces règles n'ont pas force ici. Sous le droit romain, il paraît que les défectuosités de l'ouvrage retombaient sur le constructeur. et celles provenant du vice du sol sur le propriétaire. Cependant l'ancien droit français faisait retomber toute la responsabilité sur le constructeur, et rangeait les défauts pro-

venant de la nature du sol, parmi les cas les plus défavorables, et on le jugeait ainsi, parce que le constructeur était tenu de connaître son art, et de s'assurer si le terrain était suffisamment solide pour porter les bâtiments à ériger. La seule restriction apportée à cette garantie était quant à sa durée, qui était limitée à dix ans. Dans cette cause il y a eu un architecte employé, et l'entrepreneur voudrait faire retomber sur lui la responsabilité, vu que cet architecte avait, non seulement à voir à l'exécution de ses plans, mais de plus, à surveiller tout l'ouvrage. En recourant au Nouveau Dénisart (1) on voit qu'il était d'usage d'employer un architecte, lorsque la bâtisse était de quelque importance, mais un peu plus loin, l'auteur ajoute que, dans le cas de quelque défaut dans la construction, la responsabilité retombe non seulement sur les maçons et constructeurs, mais encore sur l'architecte. Je trouve en effet bien des cas où ils ont été déclarés responsables, mais aucun où ils aient été libérés. Ceci peut être dû à ce que l'architecte avait lui-même employé les ouvriers, et était devenu par là responsable envers le propriétaire. Mais dans le cas actuel, le propriétaire a contracté directement avec le constructeur qui s'est obligé de suivre les plans d'un architecte, et par là est devenu responsable au propriétaire; ce qui n'empêche pas l'architecte d'être responsable conjointement et solidairement avec le constructeur, car tous deux devaient connaître leur art, et le propriétaire qui veut bâtir n'est pas censé connaître si le sol est de nature à supporter les fondations. Ici le vice du sol est clairement prouvé, et le jugement rendu en Cour Inférieure doit être maintenu. Je référerai sur ce sujet au Nou. Dénisart, (2) et Duvergier (3) s'appuyant sur Pothier, établit que la perte partielle ou totale de la bâtisse est au risque du constructeur, soit qu'elle procède des défauts de l'ouvrage ou du vice du sol.

PANET, Juge : Pour ma part j'irais même plus loin que l'honorable président de la cour, son opinion est basée sur le fait que la perte était prouvée être la conséquence du vice du sol; suivant moi cette preuve n'était pas nécessaire, et le constructeur est responsable de tous les vices qui peuvent se rencontrer, et qu'il ne prouve pas provenir de force majeure ou du fait même du propriétaire. (4) Ici l'entrepreneur n'a pas pris les précautions nécessairés, et il est conséquemment responsable.

(1) N. Dénisart, *verbo* bâtiment, nos 3, 5, 9.

(2) Nouv. Dénisart, *verbo* bâtiment, nos 3, 5, 7.

(3) Duvergier, *Louage*, no 348.

(4) Lahaie, *Code civil*, Art. 1792, p. 782; 2 Lepage, *Lois des Bâtiments*, p. 77.

AYLWIN, Juge : Le droit romain faisait une distinction entre l'ouvrage fait *per aversionem*, et celui fait à la mesure, le constructeur était responsable jusqu'à ce que l'ouvrage eût été reçu dans le premier, ou mesuré dans le second cas. Le droit français a été plus loin en rendant le constructeur responsable, même après la réception de l'ouvrage, tant pour les vices de l'ouvrage que pour ceux du sol. Dans le cas actuel l'Appelant a allégué qu'un autre individu était garant des vices du sol ; mais ceci ne peut l'exonérer.

Cet entrepreneur peut être étranger et peu au fait de nos lois, et a pu croire que l'interposition d'un architecte dont il devait suivre les ordres avait l'effet de le libérer de la garantie des ouvrages, cette décision pourra paraître dure à son égard. Il est à espérer que ce jugement sera rendu notoire, surtout dans ce temps ou grand nombre de constructions se font chaque jour ; et si les gens font des marchés qui entraînent la responsabilité que nous déclarons aujourd'hui, ils le feront en connaissance de cause. Le jugement de la Cour Supérieure est confirmé. (1 *D. T. B. C.*, p. 343 et 5 *D. T. B. C.*, p. 65.)

BETHUNE and DUNKIN, for Plaintiff.

CROSS, for Defendant.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Montreal, 5 février 1850.

Before DAY, SMITH, and VANFELSON, Justices.

SAMUEL BENJAMIN et al., *vs.* FREDERICK WILSON.

Jugé : Que l'allégué dans un affidavit, que le Défendeur lui-même a dit qu'il partait pour la Californie, est suffisant pour justifier l'émanation d'un *capias ad respondendum* en vertu du statut de la 12e Vic., ch. XLII.

A writ of *capias ad respondendum* had been sued out, and the Defendant arrested. The affidavit, which was made by the Plaintiff's book-keeper, alleged the following reasons : " That this deponent hath reason to believe and doth verily " believe that said F. A. Wilson is immediately about to leave " the province of Canada, with intent to defraud his creditors, " inasmuch as said F. A. Wilson told this deponent, this mor- " ning, that he was leaving, as deponent understood, on his " way to California, and deponent has been told by others " that the said F. A. Wilson was about to leave for Cali- " fornia."

Defendant moved to quash the writ, on the ground of insufficiency of the affidavit.

The court held the affidavit to be sufficient, and rejected the motion. (1 *D. T. B. C.*, p. 351.)

E. and G. CARTER, for Plaintiff.

MACK and MUIR, for Defendant.

CAPIAS.

SUPERIOR COURT, Montreal, 7 January, 1851.

Before DAY and MONDELET, Justices.

JOHN LEEMING *vs.* ALEX. G. COCHRANE.

Jugé : Que les allégués, qu'un Défendeur a enlevé certains effets déposés entre les mains du Demandeur pour sûreté du paiement d'un billet, qu'il a refusé de remettre un cheval, qu'il est étranger, a omis de tenir ses engagements et se cache de ses créanciers, sont insuffisants pour justifier l'émanation d'un writ de *capias ad respondendum* en vertu de la 12e Vic., ch. XLII.

A writ of *capias ad respondendum* was issued on the affidavit of Plaintiff, for a debt of £34, stated in the affidavit to be for " the price and value of goods, wares, and merchan- " dise by said deponent heretofore sold and delivered to said " Defendant, at Montreal ; that this deponent has reason to " believe and doth verily believe that the said Alexander G. " Cochrane, the said Defendant, is immediately about to leave " the province of Canada, with intent to defraud the said " deponent and others his creditors, and is about, with such " intent aforesaid, to secrete his effects ; that the said Alexan- " der G. Cochrane placed a quantity of goods, to a value of " upwards of twenty pounds currency, in possession of depo- " nent for the price of which the deponent has endorsed a note " drawn by the said Cochrane, which is now in the hands of a " third party, and the said Alex. G. Cochrane, after the deli- " very of the said note by the deponent, which was done " solely on the faith and security of the said goods, obtained " and took away from said deponent's store the said goods, " without deponent's knowledge or consent ; that said depo- " nent also, afterwards and within a few days last past, agreed " with said Cochrane to take, as payment of such liability and " to indemnify said deponent, for such endorsement, a horse " belonging to Cochrane, which he agreed, in presence of " deponent and divers his clerks, to deliver to deponent, but " said Cochrane failed and refused to deliver said horse ; that " Cochrane is a stranger, recently arrived in this city ; that " Cochrane, after making appointment and promise to pay " the amount of deponent's claim, failed to do so ; that depo-

" nent hath been credibly informed and verily believes that " said Alex. G. Cochrane has withdrawn himself from his " creditors ; and that said Defendant, in addition to the " amount of said note on which he is liable, is indebted also in " the said sum of £34 currency ; that the deponent hath " been credibly informed by divers credible persons that, in " their opinion, the Defendant aforesaid was likely to clear " out and leave this province."

Defendant moved to quash, on the ground of insufficiency of the affidavit in not setting forth special grounds to justify the belief of Plaintiff.

The court granted the motion, DAY, Justice, observing that the statute recently passed (12th Vic., ch. XLII) for the relief of persons liable to arrest, contemplates the necessity of an absolute precision in the statement of the grounds of arrest, so as to enable the Defendant to meet and, if possible, disprove them. If information from these parties was alleged, the names of these parties should be given. (1 *D. T. B. C.*, p. 352.)

A. and G. ROBERTSON, for Plaintiff.

DEVELIN, for Defendant.

CAUTIONNEMENT.—SUBROGATION.

SUPERIOR COURT, Montreal, 5 May, 1851.

Before DAY, SMITH and MONDELET, Justices.

JOHN REDPATH et al., *vs.* GEORGE MCDOUGALL et al.

Jugé : Que l'existence de plusieurs sûretés et la perte de l'une d'icelles, ne libère pas les autres, et que la clause de subrogation, dans un acte d'obligation, n'est qu'un énoncé du droit commun.

This was an action brought by the Montreal Provident and Savings Bank, on an obligation for £300, and interest.

The declaration alleged the making of the obligation, on the 6th February, 1844, by George McDougall and John Morrison, as principal debtors, and the other Defendants as sureties, the failure of the principals to pay the obligation, after notice given, and the liability of the whole of the Defendants.

McDougall and Morrison, the principals, made default : the other Defendants appeared, and pleaded that, by the obligation, in which they intervened and became bail and surety for the said George McDougall and John Morrison, a certain lot of ground was specially hypothecated for securing the payment of the sum of money mentioned in the obligation ; that, by the said obligation, it was expressly stipulated between the said

parties, Plaintiffs, and the said sureties, " that, in the event of " the sureties being called on for the payment of the whole or " any part of the said £300, then and in such case, the said " surety or sureties paying the same, shall be substituted and " subrogated in all and every the claims, privileges, and mort- " gages, hereby created in favor of the bank, for the amount " which the surety or sureties may pay. " That, afterwards, on the 2nd February, 1846, McDougall and Morrison sold the lot of land so mortgaged to Charles Churchill, who, afterwards, on the 29th July, 1846, obtained a judgment of ratification, without any opposition having been filed by the bank, that, in consequence, Plaintiffs are unable to substitute and subrogate, Defendants in their rights, as created by said mortgage, and, in consideration of which contingent substitution, Defendants consented to become such sureties.

By a second plea, Defendants prayed, that, in the event of their being condemned to pay the said £300, such judgment be conditional on their being substituted by Plaintiffs in their rights on the said real estate under the obligation.

To these pleas, Plaintiffs filed special answers alleging that if no opposition had been filed, it was from the neglect of Defendants, in whose interest the said opposition was required; that, in requiring the security of Defendants, the object of the Bank was to insure the perfect safety of their claim, so that they would not require to rely on the mortgage, but, in case this should fail, that they might look to the sureties, who were always regarded as chief and principal guarantees; that they were and always had been ready, in so far as they have the power, to subrogate the sureties in all their rights against McDougall and Morrison, but that, in fact, such subrogation was unnecessary, since it was already given by the obligation.

The following authorities were cited at the hearing: Pothier, on Oblig., n° 280 and 557; 7 Toullier, 172; Troplong, *Cautionnement*, n° 530, 531 et 532; *do.*, de la Vente, n° 941 *et seq.*; 2 Duvergier, n° 276 *et seq.*

DAY, Justice, in rendering judgment, said: The question now raised has been decided in the case of *Morris* vs. *Harrison*, October Term 1849, and the court need only refer to the doctrine laid down by Toullier and Pothier, against the opinions, however, of some other authors of high reputation, viz.: that when a creditor takes a variety of different securities, and thinks proper to be still in respect to some of them, so that they are lost, that does not effect his right to recover against the others; but it is pretended that the present case is taken out of the general rule by the clause in the deed, which says, that the sureties are to be subrogated in the claims of the Plaintiffs for the amount they may pay. On carefully reading this clause,

the court is against this pretension. The clause does not create any new right : it is, in fact, nothing more than the enunciation of the common law right, as it existed before. If more was meant, the parties should have said so, and should have stated expressly that they only became security on the ground that all other collateral securities were to be held for them. Although the clause is somewhat ambiguous, the court are unanimous as to the interpretation which ought to be given to it.

Exception dismissed, and judgment in favor of the Plaintiffs for the amount sought to be recovered. (1 *D. T. B. C.*, p. 354.)

CROSS, for Plaintiffs.

ROSE and MONK, for Defendants.

CAPIAS.

SUPERIOR COURT, Montreal, 10 juin 1851.

Before DAY and SMITH, Justices.

EDWIN CORNELL *vs.* JONATHAN MERRILL.

Jugé : Que l'allégué, que le Demandeur a été informé d'une manière croyable que le Défendeur a secrètement emporté ses effets, pendant la nuit, dans l'intention de laisser la province, n'est pas suffisant pour soutenir l'émanation d'un writ de *capias ad respondendum*, si le nom de la personne qui a informé le déposant de tel fait n'est point déclaré.

A writ of *capias ad respondendum* had been issued on the Plaintiff's own affidavit, which was as follows : " That this " deponent is credibly informed, hath every reason to believe, " and doth verily and in his conscience believe, that the said " Jonathan Merrill is immediately about to leave this province " of Canada, with intent to defraud this deponent and his cre- " ditors generally, whereby, etc., (as in ordinary form) ; and " for special grounds of the belief set forth and contained in " this affidavit, this deponent saith, that he hath been credibly " informed, and hath every reason to believe, that the said " J. M., on the 15th April instant, and, on divers other days, " between that day and the date of these presents, hath secretly " removed, and is still removing his personal property, furni- " ture and effects, from his dwelling-house, in Stanbridge " aforesaid, in the night-time, with an intent suddenly to " depart this province, and to defraud this deponent and his " creditors generally."

The Defendant moved to quash on the ground, that the affidavit set forth no special grounds, as by law required, to justify the belief, on the part of the Plaintiff, of the allegations

therein contained, and because it did not disclose the name of the party from whom the information had been obtained.

At the argument, it was contended by the Plaintiff's counsel, that the disclosure of the names of the party giving the information, and all the facts respecting that information were matters of evidence, to be determined hereafter, and could not be raised on a simple motion to quash.

The court granted the motion to quash, DAY, Justice, observing: The court has already established the rule that, when the party making an affidavit for a *capias*, does so on the information of others, he must disclose the name of his informant. It would be making a mere mockery of the late statute, if the affidavit could be made in the same terms as before that statute was passed. It is important for the debtor to be able to contradict the assertions of the affidavit, and he may not be able to do this unless he knows from whom they proceed. This is the rule in England, and it is a rule the court intends to observe here. It may be made a question whether a motion to quash is the proper mode of proceeding, but as that has been the course hitherto observed, the court does not feel called upon to depart from it, and, therefore, grants the motion. (1 *D. T. B. C.*, p. 357.)

MACK and MUIR, for Plaintiff.

DEVLIN, for Defendant.

PROCEDURE.—PLAIDOYERS.

SUPERIOR COURT, Montreal, 17 June, 1851.

Before DAY, SMITH, and MONDELET, Justices.

MARIE A. DUBÉ, Plaintiff, *vs.* ISIDORE PROULX, Defendant, and FÉLIX PAQUIN et al., T.-S.

Jugé : Que d'après l'interprétation de la 25e sec. de la 12e Vic., ch. XXXVIII, une exception à la forme et un plaidoyer de paiement ne peuvent être plaidés conjointement et en un seul et en même temps.

In this case, a writ of *saisie-arrêt* had been sued out after judgment. The Defendant appeared, and pleaded : 1° an *exception péremptoire à la forme ;* 2° a plea to the merits, alleging payment. The Plaintiff moved to reject the *exception à la forme*, because the Defendant had, by the same plea, pleaded to the merits, and had thus covered the pretended nullity of which he complained.

DAY, Justice, in delivering the judgment, said : The court is with the Plaintiff. The uniform practice of the court has

been, that all preliminary exceptions should be disposed of first. Under the old rules of practice, *exceptions déclinatoire, dilatoire,* and *à la forme,* were required to be pleaded together, and under that rule and the practice prevailing in this court, they could not be pleaded at the same time with those to the merits. This is the rule which was uniformly acted upon up to the time of the passing of the last judicature act. The question now raised is concerning the interpretation to be put upon the 25th section of that act. The court is not disposed to give this clause such an interpretation as would admit the correctness of what has been done by the Defendant in this case. We cannot depart from what has been the uniform practice of the court, until directed to do so by a superior tribunal. In saying this, it has not escaped our attention that a judgment rendered in the court of Appeals, in the case of *The British Fire and Life Insuranee Company* vs. *McCuaig et al.,* seems to establish a different rule ; but, as this particular question was not before the Court of Appeals in the case in which this decision is reported to be given the decision must be regarded as an *obiter dictum,* and cannot have the force of a judgment so as to make this court depart from what has been its uniform practice.

JUDGMENT : The court considering that said *exception à la forme* and the exception of payment cannot be conjoined and pleaded at one and the same time, and that, by pleading the said exception of payment, the Defendant hath necessarily covered and waived all vices of form in the process and declaration in the said cause, doth maintain the said motion, and reject the said *exception à la forme.* (1 *D. T. B. C.*, p. 364.)

DE BLEURY, for Plaintiff.

LAFONTAINE and BERTHELOT, for Defendant.

COMPAGNIE INCORPOREE.—ACTIONNAIRE.

IN THE CIRCUIT COURT, Quebec, 30 June, 1851.

Before DUVAL, Justice.

THE QUEBEC AND RICHMOND RAILROAD COMPANY *vs.* DAWSON.

Jugé : Qu'un actionnaire dans une compagnie incorporée, peut opposer à l'action d'une telle compagnie qu'elle ne s'est pas conformée à son acte d'incorporation, et qu'en conséquence elle n'est pas légalement en existence.

This was an action brought by the Quebec and Richmond Railroad Company against a shareholder, to enforce payment of the amount of the first instalment, duly called in, on two

shares subscribed by the Defendant to the stock of the said company.

"To this action, Defendant pleaded by exception, that ad-
" mitting that he is a subscriber on the books of the persons
" incorporated under the provincial statute, 13th and 14th
" Vic., ch. CXVI, for the purposes in said statute mentioned, he
" is not liable to pay any sum of money whatever because he
" signed the said books upon the condition that said act of
" incorporation should not be carried into execution until fif-
" teen hundred shares of the stock of said company should be
" subscribed, and that, at the time that said company of per-
" sons held the first meeting for the election and choice of di-
" rectors, as directed by the statute, there were not fifteen
" hundred shares of said stock subscribed; by reason whereof
" the said company of persons were not as the said first meet-
" ing competent to carry the said statute or act of incorpora-
" tion into execution, and the Plaintiffs, are not *in esse*; that
" since the first meeting, certain persons, among those who,
" at the time of the said meeting, were proprietors of shares
" in the said company, fraudulently intending to deceive and
" defraud others, the subscribers, and amongst them Defen-
" dant, did, after the first meeting, and for the purpose of
" completing said fifteen hundred shares, unlawfully take and
" subscribe their names for several shares, upon condition,
" that no liability would attach to them by reason of their so
" signing therefore."

Plaintiffs took exception to this plea by a demurrer, and it was contended that it was not competent to Defendant to raise the question of the legal existence of the company incidentally, in a defence to an action brought against him, that the company was *de facto* in existence, and that, if the company had not complied with its act of incorporation, the legal remedy, or the means of trying such a question, was by a writ of *mandamus*, or by information *quo warranto* (1), or by the mode prescribed by our provincial statute (2).

DUVAL, Justice: I cannot understand on what ground the Defendant can be denied the benefit of the exception he has pleaded; the act incorporating the company empowers the directors chosen under the authority of the act, to make such calls of money from the proprietors, as they, the directors, shall deem requisite to defray the expenses incurred. It is unquestionable that the only persons who can make such calls of money, are the directors appointed in the manner prescribed by the act. The 33rd clause enacts that the directors shall

(1) 6 Petersdorff's Abridgment, *verbo* Corporation, pp. 652, 653 *et seq.*

(2) 12 Vic., ch. XLI, sec. 8.

be chosen at the first general meeting of the proprietors for putting the act in execution, and this first general meeting may be held whenever 1500 shares shall have been subscribed for. If this meeting could legally be called before the 1500 shares had been taken, then it might have been called when 50 or 10 shares, or even a less number had been taken, and the directors then chosen would be invested with all the power given by the act referred to. Is this the Defendant's contract? Certainly not. Such interpretation of the law would prevent any man of ordinary prudence and discretion taking shares in any of these public companies, which would become wild, senseless speculations, bringing ruin on all connected with them. The plea filed has been allowed in the case of the *Salem Mill Dam Corporation* vs. *Riper* and in other cases (1), it is founded on clear principles of law, by which the court must be guided in interpreting contracts between parties, and the facts it sets forth, if proved, will entitle the Defendant to a judgment in his favor. The demurrer is overruled. (1 *D. T. B. C.*, p. 366.)

LELIÈVRE, for Plaintiffs.

STUART and VANNOVOUS, for Defendant.

PROCEDURE.—PLAIDOYERS.

CIRCUIT COURT, Quebec, 28 juillet 1851.

MCLEAN *vs.* MCCORMICK.

Jugé: Que la défense au fonds en fait est incompatible avec un plaidoyer d'exception péremptoire qui admet l'existence d'un billet, ou la vente et livraison de certains effets, et qui en allègue le paiement.

Les allégués d'une pareille exception sont nécessairement divisibles, sans quoi aucune contestation ne peut être liée sur icelle.

POWER, Justice: The action is for the recovery of the amount of a promissory note, to which Defendant files a plea of *défense au fonds en fait*, and also a plea of peremptory exception, whereby he admits the making of the note, and alleges payment, which he has failed to prove. Plaintiff, who has not adduced any evidence, prays for judgment upon the admission contained in the peremptory exception. Defendant demands dismissal of the action, upon the ground that the general issue rendered it incumbent on the Plaintiff to prove the making of the note, and moreover, that the admission and allegation of payment contained in the exception, being indi-

(1) Angell and Ames, on Corporations, p. 495, last Ed.; 1 Moodie and Malcolm, p. 191; 2 Barnewell and Adolphus, p. 518; Harrison's Digest, *verbo* Public companies; Bisset on Partnership, p. 389.

visible, the exception, if entertained at all, must be taken to be true in the entire, and the sum demanded considered as paid.

The two questions which arise here, 1° whether the general issue is compatible with the plea of payment, and 2° whether the admission of the Defendant, in his plea of record, exempts the Plaintiff from the necessity of proving the facts so admitted, appear very plain and simple, and they are really so. There is no reason or law that I am aware of, to prevent a Defendant from filing as many pleas to an action as he may see fit, provided they are consistent and not contradictory with one another; but, as our law requires the pleadings to be in good faith, or at least, to have the appearance of being in good faith, which is all that can be exacted, I hold it to be illegal, because it is immoral, to permit a Defendant to prevaricate by saying in one plea: "Yes, I made the note;" and in another: "No, I did not." Where, in the ordinary affairs out of court, a man is called upon to answer a question or a demand, he cannot venture to give contradictory answers without incurring the imputation of being a palpable shuffler and liar, and, therefore, it is highly improper that he should be permitted in a court of justice, a place sacred to truth, to perpetrate that which the smallest share of integrity or regard for his reputation, would prevent him from doing elsewhere.

By the French law, contradiction, as opposed to good faith either in pleading or in proof, would be taken against the party guilty of such contradiction.

"*Des preuves de fait que les parties ont entre les mains, et qu'elles emploient par les écritures et plaidoirie.*

"Ces preuves sont de deux sortes: les premières, celles qui "résultent des titres et pièces; les secondes, celles qui résul- "tent des aveux, consentements et contradictions d'une partie, "soit dans ses écritures, soit dans sa plaidoirie. Pigeau, vol. I, "p. 216.. Les contradictions sont regardées comme preuves "du fait denié, lorsqu'elles sont essentielles. Si elles sont d'une "force moyenne, elles preuvent être regardées comme un com- "mencement de preuve seulement, que le juge complète, etc. "Cependant, une contradiction complète a plus de poids qu'un "simple aveu, parce que celui qui y tombe se faisant ordinai- "rement pour un homme de mauvaise foi, on ne présume "guère qu'il la fasse de dessein prémé lité." *Ibid.*, p. 227.

He who pleads payment is bound to prove it, and the Defendant, having offered no proof of his alleged payment, and as on the part of the Plaintiff it would be unmeaning and useless to prove the making of the promissory note, because the most solemn and formal proof of that fact, is the Defendant's admission of it on the record, I should limit my observations, in giving

judgment in favor of the Plaintiff, upon the questions under consideration, to the plain and unsophisticated reasons I have mentioned were it not that these questions have of late years assumed a strange complexity, by having interwoven with them another question, of a subtle and refined nature, namely, the question of the *aveu judiciaire*, which, in the opinion of many, justifies the use of repugnant and inconsistent pleas. The result, however, is, that the general issue and plea of payment are now almost always filed together ; as if the object of justice required it, as if the dignity and importance of truth could only be ascertained by a standard of prevarication.

By the rules of practice of the late Court of King's Bench for the district of Quebec, adopted in the year 1810, and continued in force down to the 17th December last, the general issue and an affirmative plea admitting and avoiding the debt, were permitted to be filed, at the same time, to the same action. The first question of pleading that occurred under these rules, was in the same year, 1810, in the case of *Forbes* vs. *Atkinson*, reported in Stuart's Reports, p. 106, and also in Pyke's Reports upon which the late Chief Justice Sewell entered into an extended consideration of the subject of pleading in general, and the adaptation of those rules to the ends of justice.

He went into a wide range of explanation, quoting largely from the French and English writers on pleading, and concluded without any allusion to the incompatibility of the general issue with the plea of payment, or the slightest attempt to reconcile them, as *logical* and *consistent* with each other. Nor was it possible for him to do so ; for the rules were an amalgamation of the French and English systems of altercation, considered necessary on account of the trial by jury in certain cases. The tendering of issues unknown to the French law, each issue often purporting to be contradictory to, and inconsistent with the other, could not harmonize with the *contestation en cause* and *instruction* of the French system, which required all the proceedings to be in good faith. A union was, however, effected of two systems, wherein one is only permitted to exist, on condition of constantly violating its own principles ; and yet even by this sacrifice, it only obtains the greatest share of the evils, with the smallest part of the advantages of the other system. The practice, however, of filing those contradictory pleas continued and still continues, with this very remarkable difference, that down to the year 1838, whenever the general issue and plea of payment were filed together, and no proof adduced in support of either, the general issue was considered inoperative and neutralized by the plea of payment, and judgment invariably given upon the admission in the plea, when sufficiently ample, in favor of the Plaintiff. The correctness of this mode

of decision was once questioned and maintained in the year 1820, for I find in the 3rd vol. of the *Revue de Législation et de Jurisprudence* this citation :

" If a Defendant by exception admits his signature to a " promissory note of hand and pleads a term for payment, it " is not necessary for the Plaintiff to prove the signature, " even if the exception be dismissed, and there is a *défense en " fait. Vallières* vs. *Roy*, 1820."

According to these decisions, inconsistent and incompatible pleas, introduced as part of the system to which they belonged, were perfectly innocuous and had no effect ; for whatever was admitted by the plea of exception, was so much which rendered proof thereof unnecessary ; but when, in 1838, the court was recomposed, new decisions established a new jurisprudence, giving effect to the use of those inconsistent pleas, and, in a case such as the present, holding one plea to be indivisible and the other a denial of the debt, dismissing the Plaintiff's action with costs in favor of the Defendant.

This practice has continued hitherto, founded, it is said, upon the doctrine laid down in the French authorities upon the *indivisibility* of the *aveu judiciaire*. Let us examine for a moment how this doctrine, which is derived from the Roman law, is applicable, whether to the Defendant's voluntary plea, or to his statement when called on to answer upon oath, (for each party was permitted to have the other examined before the prætor upon oath. " Licentia in omnibus his concedenda " adversario jusjurandum inferre. Dig., liv. XXII, tit. III, ch. " IV, de probationibus), " or to both.

" In civilibus confessio non scinditur, verum qui dicet, mu- " tuum dedisti sed solvi, non est securus. In civilibus ergò " scinditur confessio ? sed tunc quià duabus enuntiationibus " utitur, non autem fatetur qui ita excipit, solvi actori quid- " quid debeo."

" Non utique existimatur confiteri de intentione adversa- " rius, quià exceptione utitur." Liv. XLII, tit. II, cod. 7, de con- " fessis in jure. "

He, therefore, who thus excepts does not confess, although he admits the debt, for he adds that he paid it, and the same honesty which dictated the admission, must be held to pervade the remaining part of his answer. The indivisibility of a Defendant's answer upon oath is, in many cases, I think, correct ; but not as a general rule ; for, if so, the exceptions to it are so numerous, as to become as broad as the rule itself. Here is one : upon an action for rent for the use and occupation of a house, the Defendant, by his answer, admits the use and occupation, but adds that he paid the rent. Here the answer ought to be divisible, for as his use and occupation of the house

could be proved by all his neighbours, his admission ought not to entitle him to have his assertion of payment taken as true without proof thereof. It is only in cases where the fact is susceptible of no other proof than the Defendant's own oath, and where, if he were dishonest, he might deny the debt with impunity, that his answer is indivisible. Where, for instance, from mutual confidence money is lent and returned without the precaution of having a writing respecting it or witnesses present. I admit, therefore, the indivisibility of the *aveu* as a correct principle of law, and not as a general rule, for that would be *hasty generalising*. But each principle should be confined to its own appropriate sphere of action and not taken to subvert other principles of law equally well established: such as " probare debet qui excipit, actoris enim " partibus fungitur. Agere is videtur qui exceptione utitur, " nam reus in exceptione actor est. Probare debet qui pecu- " niam solutam affirmat." Dig., liv. XXII, tit. II, cod. 4. That the Defendant, by his plea, admitting, affirming and avoiding, becomes the actor; that he who alleges payment is bound to prove it; that facts patent upon the Defendant's plea need no proof on the part of the Plaintiff; that every admission made in a plea is taken most strongly against the party making it for he is supposed to favour his own cause are all principles of law, which, in my humble opinion, have been overturned, by the application or rather misapplication of the doctrine of the indivisibility of the *aveu judiciaire*, to pleading.

It will be unnecessary for me to cite here all the opinions of the French jurists who have commented on this subject, as there is an able dissertation in the Ist vol. of the *Revue de Jurisprudence*, commencing at page 18, under the signature M., and also a conflicting article in the same volume, p. 191, in answer to M., wherein those opinions are set forth. I have gone over the authorities cited by both these writers, and concur with M., who, in a strain of the most cogent and enlightened reasoning, combats the interpretation which the courts have lately put on the indivisibility of the *aveu*, and shews that, whenever it is applicable, it refers to the answer of the Defendant on oath, and not to his pleadings.

I shall, however, take up here the strongest authorities cited, by which it would seem to apply to pleading. As to Pothier, Toullier and Merlin, they treat of it solely with reference to a confession, and the question, in the II vol., Cochin, p. 689, his 40th consultation, was, " si l'on peut diviser la " confession d'un débiteur qui n'est point obligé par écrit," and although Mr. Cochin admitted, that under a similar circumstance to that submitted to him, there was a recent decision of a court that it was divisible, yet he was of opinion

that it was not; because, said he, " comme il (his client) " n'était pas obligé par aucun acte de son fait, il n'avait " aucune décharge à se procurer. Les obligations se détruisent " de la même manière qu'elles se contractent." This, then, is not a question of pleading, but refers to a confession, and is corollary to the rule applicable to a written deed. " Absolvitur eo ligamine quo ligatur."

" Exception proposée n'est pas censée admettre la demande; " ainsi celui qui propose l'exception de paiement n'avoue pas " la dette." 2nd Despeisse, tit. VI, n° 5. Nothing can be more true or clear than this, but does not the *onus probandi* fall on the *excipient;* must he not prove his payment, and failing to do so, lose his cause?

" Celui qui excipe ne confesse que conditionnellement, " c'est-à-dire, en cas que le Demandeur fasse preuve de sa " demande." Dénizart, *verbo* exception, n° 11 (old edition.) It is worthy of remark, that in the new edition of Dénizart, " Corrigé et augmenté, par MM. Camus et Bayard, avocats au " Parlement," this citation is omitted. for the Defendant to confess only in case the Plaintiff could prove his demand, must have struck the new editors, as repugnant to good faith and the spirit of the french law.

" Par la commune disposition du droit, le Défendeur, quand " même il ne prouverait pas son exception, est toujours en " voie d'être renvoyé absous, si le Demandeur ne prouve sa " demande. Actore non probante reus absolvitur." 1 Bornier, p. 38.

" Le Demandeur doit prouver le fait qui sert de base à sa " prétention, et comme le Défendeur est toujours assimilé au " Demandeur, lorsqu'il avance quelque chose dans ses excep- " tions, c'est à lui à prouver le fait sur lequel il appuie sa " défense. Mais celui-ci n'est tenu à cette preuve que lorsque " celui-là a vérifié le fondement de sa demande." Guyot, *Rép.*, verbo *preuve*, vol. XIII, p. 562.

The reasonable and proper interpretation to be given to these two last authorities, is, that if the admission in the plea of exception be not sufficiently ample to enable the Plaintiff to point to it as the full proof of his demand, then he is bound to complete his evidence before the Defendant can be called upon to prove the matter in avoidance; and this is true application of the aphorism: "Actore non probante reus absolvitur," for there can be nothing more illogical and absurd than to call upon the Plaintiff to prove in his own favor, that which his adversary alleges to be true. Guyot, in enunciating the doctrine of the Roman law on this point, and puzzled perhaps by its subtility, concludes the article from which the above extract is taken in these words: " Tels sont les principes qui

" servent dans chaque affaire à résoudre la question de savoir " sur quelle partie doit tomber la preuve. Il est quelquefois " dangereux de les appliquer séparément; le plus sûr est d'en " considérer toujours l'ensemble, avant de prononcer sur la " question dont nous venons de parler. Isolés, ils peuvent être " faux dans certains cas; réunis, ils s'expliquent, se modifient " toujours les uns les autres, et assurent la marche du juge " dès le premier pas qu'il fait dans la recherche de la vérité."

In turning to the English practice, it will be observed, that although the decision of a cause must be " secundum allegata " et probata," yet rules of pleading are not to be confounded with rules of evidence. In Stephens, on Pleading, p. 342, it is laid down as a rule, that " It is not necessary in pleading " to state that which is merely matter of evidence; " in other words, it is not necessary, in alleging a fact, to state such circumstances as merely tend to prove the truth of the fact, and, in note G., in the same page: " Evidence shall never be plea- " ded, because it tends to prove matter in fact; and, there- " fore, the matter in fact shall be pleaded." Dowman's Case, Rep., vol. IX; *Eaton* vs. *Settry*, Willes, 131; *Digby* vs. *Alexander*, 8 Bing, 116.

The important rule of English pleading "that every pleading " is taken to admit such traversable matters alleged on the " other side, as it does not traverse," is now the law of Lower-Canada, introduced for the first time by our new judicature act, 12th Vic., ch. XXXVIII, sec. 85, in these words: " In any " pleading in any contested civil case, every allegation which " the opposite party shall not expressly deny, or declare to be " unknown to him, shall be held to be admitted by him." This is no new principle, although it does not appear to have existed in the civil law, " non ad effectum exceptionis pertinet quod " reus excipiens hoc ipso fateri videretur de intentione acto- " ris; " but we find that it was established in the courts of Normandy from whence the English derived it; for it is laid down in the *Commentaires de Terrien*: " Quand les parties " procedent l'un afferme faicts, si la partie contre qui les faicts " sont affermez n'en donne neance, les faicts affermez demurent " pour confessez; " and in the same work this further rule is stated: " Il est defendu de dire je denie vostre faict, et nean- " moins, je le defens; qui est à dire que quand prouve seroit, " je le soutiens impertinent. Et se faut arrester à l'une des " fins; " which means, he must make his election of one plea or issue. If this latter rule, so consonant with truth and reason, had also been adopted in England, it would have removed an immense number of the difficulties that occur in the practice there, resulting from the light of reason, bursting through the mind of the judge and inducing him to disenthral

himself from the trammels of a statutory enactment, of which I shall presently speak, and which has no hold upon us in this country.

By the English system of pleading, which is as admirable for the logical precision by which an issue is raised and the controversy reduced to one point of enquiry, as it is remarkable for that most absurd paradox, the permitting a general issue and plea of payment to be filed at the same time to the same cause of action, such a question as the indivisibility of the allegations in a plea, could never occur, for every thing admitted on a plea, is taken as so much proved in relation to the particular issue. If if were otherwise, there could be no issue. To hold that the allegations are indivisible, is to destroy the issue; because it is the traverse, i. e. denial, that raises the issue. Thus: action on a promissory note; plea payment; replication; a traverse, that is a denial payment; this creates the issue; one point only; payment or no payment, and the proof rests with the Defendant. If the plea admitting the making of the note and alleging the payment thereof, were indivisible, than the Plaintiff could not traverse it, because his traverse would not only deny the payment, but also the making of the note and thereby contradict his own declaration; no issue, therefore, upon an affirmative plea, can ever be raised, but upon the ground that the statements in the plea are divisible; and it will be remarked that by the rules of practice published the 17th December, 1850, the pleas in Lower Canada are required to be issuable, see the 42nd rule of the 9th ch., " that as soon as the issue or issues of fact shall " be perfected in any cause, either party may inscribe," etc., and such had been the case during the preceding forty years under the old rules.

I am told that this jurisprudence, of the indivisibility of a plea, is now finally settled by a late judgment of the court of Queen's Bench, in the exercise of its appellate jurisdiction. If such were the case, it would have the effect of imposing upon me a respectful silence, and of restraining my action in this matter but not of controlling my reason; but upon looking into the cause referred to, that of Holland, Appellant, and Wilson & al., Respondents, recently reported by our law reporter, p. 60 of his reports, (1) and headed: " The admission contained in a plea " cannot be divided, but must be taken in its entire, " I am not satisfied that the question, which was mixed up with other questions, although argued and relied upon, was fairly before the court, or that the point was decided; for the judgment itself, which the law requires should be

(1) 2 *R. J. R. Q.*, p. 403.

motivé, is silent on the subject. As to the judgments of the Superior Court, which is a court of appeal *quoad* the Circuit Court they command from the latter the highest respect, but are not, by law, binding on the Circuit judges, in cases between £20 and £50, which may be further appealed to the Court of Queen's Bench. But let us return to the question.

"As the jury are bound to try only the matter in issue "between the parties, no evidence need be given to prove any "points which are admitted on the record, and none can be "received to dispute an admission on the record." Phillips, on Evid., p. 168; Bull. N. P. 298.

The reasonable doctrine of Estoppel, the commendable disallowance of duplicity in a plea, and the prohibition of that captious statement called a *negative pregnant*, are attributes of the English system, which exposes the more glaringly, on account of the contrast, the inconsistency of the practice under that system of filing together the two contradictory pleas, the general issue and plea in avoidance. Thus, duplicity in a plea is not allowed, the allegations must be consistent, and yet two pleas, each consistent in itself, but contradictory of the other, may be given in answer to one demand. When truth and simplicity governed the rules of English pleading, this anomaly was not practised. We find in I Saund, 22 n. 2, and also 209 n. 8: "When a party fully confesses and avoids "his adversary's allegations by new matter of his own, he "cannot also traverse (i. e. deny) those allegations," and in Comyns and Bacon, it is said "that after confession and avoidance there "need not be a traverse." Yelv, 161 n.; Com. Dig. Pleader, ch. III; Bac. Ab. Pleas and H. 1. "Formerly a "traverse in such case was held to be mere duplicity and to "be excepted to only by special demurrer." 2 Vent., 212; 2 Lutw, 1558; Carth, 166; Yelv, 151 n.

How these inconsistent pleas came to be permitted will appear from the following extract from Chitty, on Pleading, vol. 1, p. 541:

"We have already seen, when considering the qualities of a "plea in bar at common law, and which still govern in the "formation of each plea taken separately, that it must be "single and that duplicity will render it insufficient, and that "the Defendant could not plead several defences to the same "part of a declaration; but now it is enacted by the statute "4th Ann, ch. XVI, sec. 4 and 5, that it shall be lawful for any "Defendant or tenant in any action or suit, or for any Plain-"tiff in replevin in any court of record, with leave of the "same court, to plead as many several matters thereto, as he "shall think necessary for his desence." In page 542, he adds that under this statute, "the Defendant may, in different

" pleas, plead as many different grounds of defence as may be " thought necessary, though they appear to be contradictory " or inconsistent.

" When, however, such pleas would create unjust delay, the " court will sometimes rescind the rule to plead double and " compel the Defendant to rely on one of his pleas."

" The facility," says Smith in his treatise on actions at law (p. 84, a work first published in the year 1848 " of obtaining " rules to plead several matters gave rise to an abuse similar " to the right to insert several counts in a declaration. For " the Defendant's pleader was in as much danger of failing " by reason of some variance between the evidence and his " plea, as the Plaintiff was by reason of a variance between " the evidence and his declaration, in order to obviate this " danger, he had recourse to two expedients, first he almost " always pleaded the general issue, namely, *non assumpsit*, or " *nil debet*, under which almost every conceivable defence " was allowed to be given in evidence, to the great prejudice " of the litigants, the defeat of justice and the great inconve- " nience of the presiding judge; for as the general issue was " a mere summary denial of the Plaintiff's case, by which no- " thing was admitted, each party had to arm himself at all " the points whereof the nature of the action would admit, with " evidence to guard against defeat. Thus, the Defendant obtai- " ned the advantage of being allowed to set up any defence " his evidence would warrant, while the Plaintiff was, on his " side, not unfrequently surprised by a defence of which the " pleadings gave him no notice whatever."

The reports of the Common Law Commissioners upon the abuses of the doctrine of variance, the general issue and other imperfections in pleading, have led to a very beneficial reform of the judicial procedure in England and the various Acts of Parliament, from 1st Will. IV, ch. VII, to the 8th and 9th Vic., ch. CVI, on this subject, will be found in the Appendix to Tyrwhitt's summary of the law of modern pleading. To the judges, however, by the 3rd and 4th Will. IV, ch. XLII, was delegated the power of making rules to regulate the practice of pleading, subject to be submitted, to, and approved of by Parliament, and in the section of the act delegating this power, there is this proviso: " Provided always that no such rule or order shall " have the effect of depriving any person of the power of " pleading the general issue, and giving the special matter in " evidence, in any case wherein he is now, or hereafter shall " be entitled to do so by virtue of any Act of Parliament now " or hereafter to be in force." The judges, by one of their general rules of Hilary Term, A. D. 1834, ordained " that several " pleas should not be allowed, unless a distinct ground of

" answer or defence is intended to be established in respect of " each, and that therefore pleas founded on one and the same " principal matter, but varied in statement, description or cir- " cumstance only, shall not be allowed. " They reformed the general issue by limiting its operation to a denial of the debt or contract alone, without allowing it, as formerly, the power to compel proof of the qualities of the Plaintiff, or allowing matter in avoidance to be proved under it. But still, strange to say, it is allowed to be filed in company with a plea in avoidance, because, however inconsistent and repugnant to each other these pleas are, they are considered, under the rule, distinct grounds of defence.

Tyrwhitt, in page 80, mentions it thus : " The old general " issue still exists notwithstanding the new rules which have " not altered its nature, though they have circumscribed the " range of evidence that may be given under it ; and the old " objections under it are as available as before the new rules ;" and Stephens, in his excellent book on pleading, page 273, says : " The use of several pleas though presumably intended " by the Statute (4th Ann) to be allowed in a case where there " are really several grounds, is in practice sometimes carried " further. For it was soon found that when there was a matter " of defence by way of special plea, it was generally expedient " to plead that matter, in company with the general issue, " whether there were any real grounds for denying the decla- " ration or not ; because the effect of this is to put the Plaintiff " to the proof of his declaration, or some material part of it, " before it can become necessary for the Defendant to establish " his special plea ; and thus the Defendant has the chance of " succeeding, not only on the strength of his own case, but by " the failure of the Plaintiff's proof. To this extent, therefore, " is the use of several pleas now carried ; and accordingly the " form of pleading in the last of the above examples, is in prac- " tice frequently adopted instead of that in the first, whether the " truth of the case really warrants a denial of both counts or " not. Some efforts, however, were at one time made to restrain " this apparent abuse of the indulgence of the Statute ; for " that leave, which the Statute requires, was formerly often " refused where the proposed subjets of plea appeared to be " *inconsistent.* But in modern practice, such pleas, notwith- " standing their apparent repugnancy between them, are per- " mitted. "

Having shewn by the proceeding citation, what the English practice is, and how it occurred, in relation to one of the questions under consideration, the compatibility of the general issue with an affirmative plea in avoidance, let us now see what are the recent decisions of the English courts, not in

relation to the other, namely, the indivisibility of the allegations of a plea (for that I have proved in speaking of the raising of an issue, to be impossible and an absurdity), but as to the extent and effect of admissions patent on the pleadings. I cite from Tyrwhitt, p. 89 *et seq.*:

" Some difference had existed between the Courts of " Queen's Bench and Exchequer on an important subject, viz.: " whether or not there is a distinction between admissions " made for the purposes of pleading, and like admissions " made for the purposes of proof before the jury.

" The Court of Queen's Bench held that an admission made " in the course of pleading, whether in express terms, or by " omitting to traverse what has been before alleged, must be " taken as an admission for " all purposes of the cause," " whether the facts admitted relate to the parties, or to third " persons, provided the allegations so made and not traversed " are material; adding, that before the new rules, such admis- " sion in the absence of a protestation, estopped the party, " even in another cause, from disputing the fact so admitted.

" On the other hand, the Court of Exchequer held, not only, " that no admission in one plea can be called on to assist " another plea, but that if a material fact, alleged in a plea, " is not traversed by the subsequent pleading, it is not, " therefore, admitted as a fact, so as to dispense with proof of " it before the jury as part of the case of the Defendant who " pleaded it.

" After these decisions, the Court of Common Pleas, in " treating of a separate and material allegation in a plea " which was not traversed in the replication, while a subse- " quent material allegation, which did not in any manner " involve the former, was so traversed, held " that the former " (material) allegation, not being denied, must, upon the " general principles of pleading and the authorities, be consi- " dered to be admitted by the Plaintiffs " for all the purposes " of the issue taken on each separate plea." That court had " before expressed a less guarded opinion on the subject.

" The Court of Queen's Bench has since declared, that " looking to the facts of *Smith* vs. *Martin*, and *Bingham* vs. " *Stanley*, it would be found there was no real difference of " opinion with the Court of Exchequer in those cases; adding, " that their own expression in *Bingham* vs. *Stanley*, that " an " admission made in the course of pleading, whether in express " terms, or by omitting to traverse what has been before " alleged, must be taken as an admission for all the purposes " of the cause," would have been more correctly stated, " for " all purposes regarding the issue arising from that plea;" " for without that qualification, the position might be supposed

" to extend to other issues joined in the cause, as well as to " those which arise out of the particular pleading.

" The Court of Common Pleas has also again disregarded " *Bingham* vs. *Stanley* (as it was originally stated by the " Court of Queen's Bench), TINDAL, C. J., saying, now that a " party is not allowed, in pleading, to use a protestation, it " would be hard if he were taken to admit all (semble for " every purpose), that he had not traversed.

" Where, looking separately at the issue taken on one or " each of the several pleas, a material allegation in that plea " is not denied in the replication, it must, on the general " principles of pleading and the authorities, be considered to " be admitted by the Plaintiff, for all the purposes of the " issue taken on each separate plea, i. e., to be so far admitted, " that the Plaintiff cannot adduce evidence in disproof of " that allegation in the plea. Though it was held in the " Exchequer, as we have seen, that no admission in one plea " can be called in to assist another plea, yet if the parties, in " the course of the cause, take a particular fact for granted, " which goes to support one issue, that fact may be taken for " granted for all purposes, and as to the whole case." See in the notes to Tyrwhitt, a variety of cases, on this point, reported, wherein the *dicta* of the judges and their decisions are conflicting.

This author himself concludes thus: " It is clear, on principle, " that each issue must be tried by itself, as if there was no " other on record; and the rule is the same under the new rules " as it was before them, viz., that an admission on the face of " one plea, is made only for the purpose of that issue, and " cannot be used by the Plaintiff as evidence to prove or dis- " prove a fact denied in another plea."

With all humility I must say, that it would be much more clear on principle, that no two inconsistent and repugnant issues should be permitted in the same cause; that there should not be an issue of the making of a promissory note, and another isssue of its payment, and then there could be no such discussion. It is, in my humble opinion, this original mistake, in relation to the most simple question, that gives rise to all the intricacies and subtle arguments which constitute as we read them, a mere *hocus pocus*, when applied to the eternal and immutable science of truth. It is pitiable, as Godwin observes, when the arguments of strict and profound reasoners are based upon some unperceived mistake at the commencement, to see that the further they proceed in their enquiry, and the more closely they follow their train of deductions, the more deeply they plunge into error.

It would be too presumptuous of me to say whether the

original mistake is in the Legislation (4th Ann), or in the practice of the courts under it. Smith and Stephens tell us, however, it was an abuse of the Statute; but the courts having allowed the filing of inconsistent pleas, must have believed that they were bound to do so by the law.

The Statute of Ann is law in force in the State of New-York, and in Gould's Principles of Pleading, Edition of 1849, the author, in page 431, commenting upon this Statute, says: "When several pleas in bar are pleaded, in virtue of this "Statute, to one and the same thing or demand, each of them "is treated, and operates, as if it were pleaded alone: It being "an established rule that one of them *cannot*, in the language "of Ch. J. Willes, be taken in to help or destroy another, but, "that "every plea must stand or fall by itself." And the "opinion of Mr. J. Buller is expressed in terms almost literally "the same," and he adds in note 5: "See a contrary opinion "15 Mass., R. 48, where, in an action of slander, the Defen-"dant pleaded (in virtue of a Statute similar to that of Ann), "the general issue and also a *special justification*. In which "case it was resolved, that the admission contained in the "special plea, that the words charged were uttered by the "Defendant, was sufficient proof of that fact; and that the "Plaintiff was consequently not bound to prove the uttering "of the words. And in the ingenious argument of the learned "Judge, who delivered the opinion of the court, the same rule "is held to extend to every case, in which the general issue "and a special plea in avoidance are pleaded to one and the "same demand." The author adds that "this opinion appears to "be opposed, not only to the spirit of the Statute, but to the "general practise under it." But it is possible the author may be in error, for if the maxim *ratio legis est anima legis* be true, there being no reason in the Statute, it can have no spirit and if, as Lord Coke has said, "the law is unknown to "him who knoweth not the reason thereof," it might perchance happen, that the general practice here spoken of, is in ignorance of the law. The name of the intelligent Judge is not given, and I have not the report at hand, but he appears to me, like the distinguished Judge Story, to treat the law and its practice, not as a mere art, depending on the mechanical adoption of precedent, but as a noble science proceeding from the exercise of the understanding.

I shall terminate my citations with one other from Stephens, who, although he is a warm eulogist of the system of which he so admirably treats, has, nevertheless, the candour to admit and deplore its defects; it is from the conclusion of his book, page 452: "While the system of pleading is thus in "general distinguished for the excellence of its structure, it

" cannot be denied that there are points on which its merit is " questionable. The excessive subtlety and needless precision, " by which some parts of it are characterized, often expose " suitors to the necessity of expensive amendments, and some- " times occasion an absolute failure of justice upon points of " mere form;" and in approving of the use of several pleas, in note 39, he says: " Provided only, that a party be restrai- " ned from raising issues inconsistent with each other, or such " as he knows to be without foundation, in fact, it may be " questioned whether any sufficient consideration of utility or " convenience, can be urged at the present day in favour of " the object of singleness. However, it is clear that the prin- " ciple of singleness is, so far at least, a right and valuable one, " as it may tend to prevent the parties from offering inconsis- " tent allegations, or such as they may know to be false. For " though the interests of justice seem to require, in many " cases, the allowance of several counts or pleas, in respect of " the same demand, they are, on the other hand, directly oppo- " sed to the allowance of repugnant ones, and where one of " the matters alleged, must evidently be false, the party should, " of course, be obliged to make his election between them; and " so, in allowing a party to make different allegations, he " ought, if possible, to be excluded from such as he must know " to be without foundation in fact. Yet these, which are per- " haps the only beneficial results that can flow from the princi- " ple of singleness, the present state of the law against dupli- " city, unfortunately fails to produce."

In conclusion, it remains for me to observe, that I have explained the indivisibility of the allegations of an issuable plea to be an absurdity, and have shewn that the judges of England have unanimously held the admissions in a plea, as proof against the party making the admissions, in relation to the particular issue on such plea, however they may have differed in opinion as to the further extent of those admissions.

But those questions of admissions and indivisibility sink into utter insignificance, compared to the immoral practice of filing to the same demand, two pleas repugnant to one another, both cannot be true, one must be false, and falsehood is a vice, in whatever way it is uttered, a vice which is not so excusable here, as it is in England; there, the judge will either invoke a practice of 150 years, or pointing to the Statute of Ann, say, *ita lex scripta est*, or say, as Chitty reports Lord Holt to have said in speaking of the general issue: " It is a practice which " has crept in improperly, but is now perhaps too settled to be " altered;" but from whatever source the practice sprung, and however untenable on principles of reason, it is sufficient for him, that it is warranted by precedent, and in this he is borne

out by those philosophers who say, that some absurdities are to be retained and many small inconveniences endured in every country, rather than that the usage should be violated, or the course of public affairs diverted from their smooth channel. But in Lower Canada, where neither the Statute of Ann, nor English precedent is binding, and where the French law, is adopted, imposes good faith in the practice of pleading, it is really strange to account for the reasons that have led ingenious minds, with inflexible zeal, in their search for truth, to embrace its shadow on this point of English practice and imagine they possessed the substance. The movement is retrograde, at a time when it is generally acknowledged the human mind is in a progressive state, and the science of Jurisprudence keeping pace with the advances making in every other department of knowledge. The hand of reform that has lately touched the English rules, has touched them too lightly ; they yet require to be reconstructed, more of the dross removed, and combination and consistency given to the whole, before they can become fitting examples for our odoption. But, before all things, the dominion of reason should be established over the vicious custom of inconsistent pleading, a custom that manifestly has a demoralizing influence upon the suitors bofore the court, and is evidently opposed to the great law of truth and natural justice. It should not be sanctioned by the guardians of the public morality, and the honourable profession of the law should be rescued from the imputation that the practice of pleading is a practice of fabricating falsehoods. Judgment for the Plaintiff. (1 *D. T. B. C.*, p. 369.)

ALLEYN, for Plaintiff.

PARKIN, for Defendant.

CAPIAS.

SUPERIOR COURT, Québec, 23 juin 1851.

Before DUVAL, and MEREDITH, Justices.

MAILHOT, Plaintiff, *vs.* BERNIER, Defendant.

Si dans une action commencée par un writ de *capias ad respondendum*, la cause d'action énoncée en l'affidavit sur lequel tel writ émane est différente de la cause d'action énoncée en la déclaration, tel writ de *capias ad respondendum* sera mis au néant.

This action, which was originally brought in the late court of Queen's Bench, was commenced by a *capias ad respondendum.*

The affidavit alleged that the Defendant was indebted to

the Plaintiff in the sum of £500, being the value of one half of the vessel or brigantine called *Stella maris*, belonging to Plaintiff and to Defendant who each owned one half; of which vessel Defendant was master and commander, and which said Defendant had sold and delivered in parts beyond the seas, to wit, at Halifax, in Nova Scotia, and had converted the price of the same to his own use.

The writ issued on the 17th November, 1849, and the declaration was filed, under the statute, on the 26th of the same month.

By the declaration it was alleged, that Plaintiff and Defendant were joint owners and proprietors, in the proportion of one half each of said vessel; that, by authentic instrument executed before Prévost and another, notaries, the 23rd of May, 1848, it was agreed that they should navigate the said vessel for their mutual advantage, so long as the said brigantine should continue their joint property, and that the Defendant should navigate the same in person. Further, that, if either of the parties desired to dispossess himself of his share in the said vessel, he should give to the other party the preference of making the purchase; that the Defendant took possession of the vessel and navigated her until the 28th September, 1849, at which period, at Arichat, Nova Scotia, in violation of said agreement, he, Defendant, sold the vessel, without giving the Plaintiff the preference agreed upon; that he, thereupon, delivered the vessel over to a third party, a stranger, and thereby dispossessed and deprived Plaintiff of his half of the said vessel, being of the value of £500, and of all control over the same, and converted the same to Defendant's own use and deprived Plaintiff of the power of availing himself of the option stated in the deed, of taking his Defendant's share upon his Plaintiff's account, in the event of Defendant's selling his said share, to the damage of Plaintiff, of £500.

On the 27th May, 1851, Defendant moved that the writ of *capias*, should be set aside for the following, among other reasons:

" Because the said pretented ground of action stated in said declaration, is different from the pretended cause of action stated in the affidavit.

" JUDGMENT: The court, considering that the arrest of the Defendant, in virtue of the writ of *capias ad respondendum* in this cause issued, hath been made on the affidavit of the Plaintiff alleging a debt of £500, of lawful current money, to be due and owing to him by the Defendant, as and for the value of the brigantine called *Stella maris*, the property of the Plaintiff, sold and delivered by the Defendant for the

aforesaid sum of £500, and this amount appropriated by the Defendant to his own use, considering further, that the present action is brought by the Plaintiff to recover from the Defendant the sum of £500, not for the causes mentioned in the Plaintiff's affidavit above referred to, but as and for damages alleged to have been suffered by the Plaintiff, by reason of the sale and conveyance made by the Defendant to one W. Baudreault, of the other moiety of the said brigantine, the property of the Plaintiff, in violation of the convenants contained in the deed between the Plaintiff and the Defendant, made and executed, at Quebec, on the twenty-third day of May, 1848, before Prévost and his colleague, notaries; the court further considering, that by reason of the premises, no judgment can be pronounced in this action against the Defendant in favor of the Plaintiff, for the causes stated and set forth in the Plaintiff's affidavit aforesaid: It is considered and adjudged that the arrest of the Defendant made in virtue of the writ of *capias ad respondendum*, in this cause issued at the instance of the Plaintiff, be and the same is hereby set aside." (1 *D. T. B. C.*, p. 389.)

ROSS and MCCORD, for Plaintiff.

CAIRNS H. F., for Defendant.

STUART ANDREW, Counsel for Defendant.

LOUAGE.

COUR SUPÉRIEURE, Montréal, 4 mars 1851.

Devant DAY, SMITH, et MONDELET, Juges.

BOULANGET *vs.* DOUTRE.

Jugé : Qu'il doit y avoir demande judiciaire, de la part d'un locataire contre son bailleur, ou un ordre obtenu par tel locataire contre tel bailleur, pour autoriser le locataire à demander la rescision du bail entre les parties, en raison de l'insuffisance des prémisses louées, et en raison de ce que telles prémisses sont en mauvais état et non habitables. (1)

L'action était pour recouvrement de £37 10s., cours actuel, pour loyer, avec saisie-gagerie par droit de suite sur les meubles du Défendeur, lesquels avaient été enlevés de la maison baillée à loyer par le Demandeur.

La Défendeur plaida, " que, depuis son entrée dans la mai-
" son, il avait souffert, en conséquence du mauvais état de la
" maison, causé par des vices qui ne pouvaient se prévoir ni
" apparaître lors de l'entrée du Défendeur en possession."

(1) V. art. 1641 C. C.

Après avoir détaillé les défectuosités de la maison, il alléguait qu'après avoir souffert de ces vices pendant l'hiver et l'été. il avait, vers le 2 septembre 1848, signalé au Demandeur tous les vices de sa maison pour en demander la réparation, par un protêt fait à Montréal et signifié le même jour au Demandeur le requérant de faire les réparations nécessaires pour mettre la maison habitable sous un délai de 15 jours de la date du protêt, passé lequel délai, le Défendeur déclarait ne devoir plus se considérer comme lié par le bail, qu'il tiendrait comme résolu entre le Demandeur et lui, et qu'en conséquence il cesserait d'habiter la dite maison; que le demandeur n'ayant rien fait pour l'amélioration de la maison, dans le délai porté au protêt, le Défendeur, ne pouvant continuer à habiter la maison, surtout à l'approche de l'hiver, avait été contraint de laisser la maison qu'il n'avait pas occupée depuis le six novembre 1848, ainsi qu'il était justifiable de le faire sous les circonstances sus-relatées ; que le Demandeur ne pouvait, pour les raisons ci-dessus, réclamer de loyer, et que son action était mal fondée : pourquoi, le Défendeur concluait " à ce que, le bail fût déclaré " résolu, à compter du jour que le Défendeur avait laissé la " maison du Demandeur, savoir, du 6 novembre 1848 ; qu'en " conséquence, le Défendeur fût libéré des loyers de la maison, " à compter de cette date ; que la saisie-gagerie fût déclarée " nulle, et que l'action du Demandeur fût déboutée."

Les témoins examinés par le Défendeur prouvaient que, le 5 novembre, il était entré quantité d'eau dans la maison, par les fenêtres et les lucarnes, en assez grande abondance pour pénétrer à travers les planchers et couler sur les lits qui se trouvaient au-dessous. Deux témoins avaient vu dans ce logement, et près du poêle, de la glace sur le plancher.

DAY, Justice: The evidence of the bad state of the house is with the Defendant. It appears that the house was not weather proof, but the question involved is a question of doctrine. Did the want of repairs form a ground, *pleno jure*, for a resiliation of the lease? The court is of opinion that it does not. The right of the lessee is to call on the lessor to make the necessary repairs. If the court ordered these repairs and they were not made by the landlord, the tenant might make them himself, and if he suffered damage in consequence of the delay, he could claim it from the lessee, or, after putting the lessor *en demeure*, he might obtain the resiliation of the lease. This is, the course pointed out by Pothier in his *Contrat de Louage*, and it is rendered more clear by the Provincial Statute, 3 Will. IV, (1) which in this particular only confirms the com-

(1) La section 2 du ch. I, des statuts du Bas-Canada de 1833, 3 Guillaume IV, est en ces termes :

mon law of the country. This case, however, is not to be confounded with that where the house menaced ruin, and danger attended its further occupation.

" The court, considering that it doth not appear that Defendant, by or under any *demande judiciaire*, hath required Plaintiff or obtained against him an order to make any repairs upon the house and premises in the declaration and also in the deed of lease described, and that without such requirement and order upon the Plaintiff previously made and obtained, said lease ought not, by reason of any thing in the exception of Defendant and by law, to be rescinded and set aside, dismissing said exception, doth declare and adjuge the *saisie-gagerie par droit de suite* in this cause made, good and valid. (1 *D. T. B. C.*, p. 393 et 4 *D. T. B. C.*, p. 170.)

LAFONTAINE & BERTHELOT, pour le Demandeur.

DOUTRE & LENOIR, pour le Défendeur.

PROCEDURE.—AMENDEMENT.

COUR SUPÉRIEURE, Montréal, 27 mai 1851.

Présents : DAY, SMITH and MONDELET, Juges.

THE BANK OF BRIT. N. AMERICA *vs.* TAYLOR et al.

Jugé : Que le bref de sommation peut être amendé aussi bien que la déclaration, et que l'erreur dans le domicile du Défendeur peut faire le sujet d'un tel amendement.

Le Défendeur, Hugh Taylor, était désigné, tant dans le bref de sommation que dans la déclaration, comme résidant en la cité de Montréal. Par une exception à la forme, il alléguait qu'il avait été mal assigné, et que l'assignation était nulle parce que son domicile n'était point en la cité de Montréal, mais qu'il était la paroisse de la Longue-Pointe.

En conséquence de cette exception, les Demandeurs firent motion que les dits bref et déclaration fussent amendés, de manière que le dit Hugh Taylor y fût désigné comme étant

" Toutes les fois qu'une ferme, maison, magasin ou dépendances des lieux tenus à bail seront dans un état à rendre nécessaires les réparations que la loi ou convention des parties oblige le locateur à faire, et que le locateur, après avis convenable à lui donné par son locataire de la nature de telles réparations et de la nécessité de les faire, refusera ou négligera de les faire, il sera loisible au locataire de procéder dans la vacance devant deux juges ou un juge provincial, ou le juge résidant dans le district des Trois-Rivières, par action contre le locateur pour le forcer à faire telles réparations sur le champ à ses propres frais, et pour obtenir la rescision du bail, dans le cas où telles réparations ne seraient pas faites."

de la paroisse de la Longue-Pointe, au lieu de la cité de Montréal.

Le Défendeur s'opposa à cette demande, quant au bref (writ), soutenant qu'il ne pouvait être amendé, et que la procédure anglaise d'où le writ a été emprunté n'y permettait point d'amendement, et que, d'ailleurs, la nullité invoquée était radicale, et qu'il n'y pouvait être remédié par le moyen proposé.

La cour accorda la motion et permit l'amendement.

DAY, juge, en prononçant l'opinion de la cour, remarqua que les restrictions sur cette matière ont pris naissance dans un temps où la procédure était une espèce de mystère et on peut même dire un piège. Cependant on ne trouve rien dans le droit français, non plus que dans le droit anglais, qui prohibe l'amendement en question. On a été longtemps sous l'impression, qu'en Angleterre on ne permettait pas d'amender le writ, cependant on ne trouve rien de semblable dans les auteurs qui traitent sur cette matière. La seule difficulté en Angleterre était de savoir si on pouvait amender *the original*, document qui n'est pas en usage ici.

MONDELET, juge, quoique ayant pendant huit ans invariablement débouté les actions où le Défendeur n'était pas suffisamment désigné, revient sur cette décision, et concourt dans l'opinion de la cour qui va fixer la jurisprudence sur ce point.

VANFELSON, juge, quoique ne siégeant pas dans cette cause, entretient l'opinion émise par la cour. (1 *D. T. B. C.*, p. 399.)

BETHUNE et DUNKIN, pour le Demandeur.

LORANGER, pour le Défendeur.

DEPENS.—AVOCAT.

BANC DE LA REINE, EN APPEL, Montréal, 11 juillet 1851.

Présents : ROLLAND, PANET, et AYLWIN, Juges.

CHERRIER, Appelant, *et* TITUS, Intimé.

Jugé : Que le procureur *ad lites* pour recouvrer ses honoraires et déboursés de son client, n'a pas besoin de produire un mémoire de frais taxé.

La demande était portée par l'Appelant pour contraindre le paiement de la somme de £58. 3. 2, montant des salaires et déboursés à lui dus par l'Intimé, sur un appel interjeté par un nommé George P. Lay d'un jugement rendu contre lui en faveur de l'Intimé.

L'Appelant prouva le mandat et les services, et examina, quant au *quantum* des honoraires, trois praticiens qui, après quelques déductions, établirent que les autres charges étaient

celles qui étaient habituellement accordées, et les considérèrent comme raisonnables et modérées.

Le 24 septembre 1850, la Cour Supérieure, après avoir entendu les parties, rendit le jugement qui suit :

" The court considering that the Plaintiff has failed to establish, by legal and sufficient evidence, the material allegations of his declaration, inasmuch as he has not produced or shewn any taxation by the Court of Appeals, or by any judge thereof, of the costs by him sought to be recovered by his action, the said action is hence dismissed."

La cour, en rendant ce jugement, se considérait incompétente pour taxer les frais encourus dans un autre tribunal, et DAY, juge, en prononçant ce jugement, observa que les juges ne taxent pas les frais lorsqu'il s'agit d'arrangement à l'amiable entre avocat et client, mais qu'ils doivent le faire lorsqu'il y a procès, et il cita au soutien de ce jugement le précédent dans une cause de *Hart* vs. *Hart*, jugée aux Trois-Rivières.

L'Appelant, à l'encontre de ce jugement, soumettait les cinq propositions suivantes, savoir :

1° Que cette action étant portée en paiement de salaire de la part d'un procureur contre sa partie, le *quantum* des services rendus par ce dernier, après la preuve faite du mandat et de l'occupation, pouvait tout au plus, d'après le sentiment général des auteurs, et de M. Pothier en particulier, faire le sujet d'une référence, avant faire droit, à quelque procureur ou praticien pour rapport et règlement en conséquence. (Voir Pothier, *Traité de la proc. civ*, tome VII, p. 161 ; Commentaire sur l'art. 5 du tit. XXXI de l'Ordon. de 1667, p. 496 ; Guyot, *Rép.*, verbo *Avocat*, tome 1 ; *Ibid.*, *verbo* frais et salaires, tome VII, p. 544 ; Merlin, *Rép.*, verbo *avocat* (par. 13), p. 472.

2° Que la Cour Inférieure, au moyen de la preuve qu'elle avait des services rendus et du *quantum* d'iceux pouvait elle-même faire l'application du tarif alors existant aux différents items du mémoire de frais fourni par l'Appelant, et que ce cas n'étant pas celui d'un exécutoire de dépens adjugés à une partie contre l'autre, l'intervention de cette cour ni d'un des juges d'icelle n'était point nécessaire pour la taxe de ces frais. (Voir le tarif fixé par l'Ordon. de la 20e Geo. III, ch. III, intitulée : *An Ordinance, for the regulation and establishment of fees*, mis en force par les Règles de pratique de la Cour d'Appel provinciale, et depuis continué par la Cour d'Appel pour le Bas-Canada.)

3° Que cette intervention, d'ailleurs, ne pouvait avoir lieu, sans que cette honorable cour, ou l'un des juges d'icelle, eût à se prononcer sur un incident dans une cause pendante devant un tribunal de juridiction exclusive en première instance, et sur lequel elle pouvait être appelée plus tard (comme elle l'est aujourd'hui) à rendre un jugement en dernier ressort.

4° Qu'en supposant même que cette intervention eût été régulière et légale, la Cour Inférieure n'était pas justifiable, avec la preuve qu'elle avait sous les yeux du droit d'action de l'Appelant, de le renvoyer des fins de sa demande, sans ordonner au préalable cette référence avant faire droit.

5° Que l'Intimé n'ayant, dans aucune partie de ses plaidoiries ni à aucun étage de la procédure, exigé cette formalité de la taxe, mais ayant au contraire acquiescé lui-même par ses transquestions à la preuve testimoniale du *quantum* des dits services, telle qu'offerte par l'Appelant, la Cour Inférieure ne pouvait en justice et en raison se dispenser d'accueillir la demande de l'Appelant, ne fût-ce que jusqu'à concurrence des déboursés faits par ce dernier, et au moyen desquels l'Intimé ne pouvait, dans tous les cas, s'enrichir à ses dépens. (1)

L'Intimé, en supportant le jugement de la Cour Supérieure, soutint : 1° que l'action étant uniquement basée sur un mémoire de frais, ce mémoire devait être régulier et taxé ; 2° que la Cour Supérieure n'avait pas le droit de taxer les frais de la Cour d'Appel.

Le 11 juillet 1851 fut rendu le Jugement maintenant l'Appel, dans les termes suivants :

" La cour, vu aussi que l'Appelant a prouvé qu'il avait occupé comme procureur de l'Intimé dans une cause en appel entre lui et le nommé George Peter Lay, et que le montant du salaire et la récompense des services de l'Appelant est établi par une règle de la Cour d'Appel du Bas-Canada, par laquelle la dite cour a adopté le tarif établi par l'Ordonnance de la Province de Québec, intitulé : *Ordonnance qui établit les Honoraires;* sans égard aux motifs donnés dans le jugement dont est appel, infirme le dit jugement et condamne l'Intimé à payer à l'Appelant, la somme de £22. 15. 8 courant, pour son salaire et ses services comme susdit, avec intérêt du 19 septembre 1849 et dépens, tant en cette cour qu'en la Cour Inférieure."

ROLLAND, juge, en prononçant ce jugement, déclara, comme l'opinion de la cour, qu'il n'y avait pas besoin d'un mémoire de frais taxé pour soutenir une action du procureur contre son client, pour salaire et déboursés, la pratique de quelques juges de taxer les frais, entre avocats et clients n'étant que pour les cas de soumission volontaire à ce mode de liquidation. Il observa de plus que la preuve faite par les praticiens était inutile, vu

(1) Dict. de Droit, Ferrière, *verbo* procureur, p. 475 ; 8 Merlin, *Rép.*, verbo *nullités*, *procureur*, p. 669 ; Ancien Dénizart, *verbo* procureur, tome IV, p. 21 ; Lacombe, *Recueil de Jurisp.*, verbo *procureur*, p. 521 ; Dénizart, *Collection de Jurisp.*, verbo *nullités*, n° 25 et suiv. ; Bretonnier, tit. I, liv. II, ch. XXVII ; Arrêts de Brillon, *verbo* procureur, p. 456, n° 24.

qu'il existait un tarif en vertu de l'ancienne ordonnance, que la Cour d'Appel avait adopté. (1 *D. T. B. C.*, p. 402.)

BUCHANAN, pour l'Appelant.

MACRAE et WOOD, pour l'Intimé.

RESPONSABILITE.—CORPORATION MUNICIPALE.—EMEUTE.

SUPERIOR COURT, Montreal, 27 mai 1851.

Before SMITH, VANFELSON and MONDELET, Justices.

DROLET, Plaintiff, *vs.* THE MAYOR, ALDERMEN and CITIZENS OF MONTREAL, Defendants.

Jugé: Que la corporation de Montréal n'est pas responsable dans une action portée par un individu qui a été battu dans une rixe, pour le recouvrement de dommages pour injures personnelles, et pour pertes des vêtements qu'il portait dans le temps.

This was an action for damages laid at £5150, for bodily injuries received from voters, and for loss of wearing apparel, etc.

The declaration set up that, on the 16th August, 1849, during day-light, to wit, about 8 o'clock of the afternoon, Plaintiff was peaceably passing through Notre-Dame street, in said city, when he was unlawfully and maliciously, and without any cause or provocation, violently assaulted and beaten by persons to him unknown, to the number of ten and more, who were armed with bludgeons, pistols, and other deadly weapons, and were then and there riotoustly assembled together, disturbing the public peace, and endangering the lives of individuals; that, in consequence of the injuries received Plaintiff was during six months, prevented from attending to his business, and was deprived of the use of his right eye and the first finger of his left hand, and was compelled to lay out the sum of £109 to obtain medical advice; also further damage arising out of the premises to the amount of £5000. That, at the time of the committing of these grievances, Defendants were entrusted with the preservation of the public peace, and were bound by law to have maintained good order, but failed and neglected so to do, and by reason of their neglect, became liable to Plaintiff for the damage by him received.

To this declaration, Defendants pleaded by a *défense au fonds en droit*, alleging for reasons in support thereof, that the corporation was not liable for such damage, and was not by law capable of raising any revenue from which the Plaintiff could lawfully be paid for such damage.

SMITH, Justice: The Plaintiff's pretension is, that the corporation are charged with the preservation of the public peace, and that this is a corporate right, and that their omission to do it, gives rise to their liability. This pretension is not supported by the clauses of the act of incorporation, which refer to the police force, and which do not point out what the duties of the corporation are, as regards the public peace. This arises merely by inference, that if the corporation raise a police force, they are bound to keep the public peace. The statute, however, does not go so far as this, it does not say so much as the Plaintiff has said in his declaration, that the corporation shall be liable for breaches of the peace. There are two classes of obligations affecting corporations, 1° those arising out of their ministerial character, and 2° such as attach to them in their high public municipal character. The liability of a corporation is only for acts or omissions purely ministerial, never for cases where it is the reflective agent of the state, having to exercise a *quasi* judicial discretion. In this case the duty of the corporation was not of a ministerial nature, but of a high judicial character: the demurrer, therefore, must be maintained, and the action dismissed (1). (1 *D. T. B. C.*, p. 408.)

CARTER and CARTER, for Plaintiff.

PELTIER (Attorney) and DUNKIN (Counsel), for Defts.

INHUMATION.—EGLISE ANGLICANE.

SUPERIOR COURT, Quebec, 21 July, 1851.

Before DUVAL and MEREDITH, Justices.

Ex parte WURTELE, Petitioner for a writ of mandamus.

Jugé : Qu'un ministre de l'Eglise anglicane, dans une paroisse dans laquelle se trouve un cimetière approprié et consacré par les autorités de sa propre Eglise, ne peut être contraint d'inhumer les morts dans un endroit qui n'a pas été sanctionné ou approuvé comme un cimetière par les autorités de cette Eglise.

DUVAL, J. : This is an application for a *mandamus* to the Lord Bishop and Rector of Quebec to compel the burial of

(1) *Angell* and *Ames*, on Corporations, pp. 30, 31. The following are the leading English cases referred to at the argument: *Jackson* vs. *Inh. of Calenworth*, 1 T. R., 71, 73; *Russell* vs. *Men of Devon*, 2 T. R., 667, 673; *Lynn* vs. *Turner*, Comp. 86; *Lyme Regis* vs. *Henley*, 5 Bing., 91; also Bacon's Abrid., *verbo* Hue and Cry; Buller's N. P., same work; Comyn's Digest, *verbo* Hundred; Petersdoff's Abrid., same word. Amongst the French authors, Guyot, *verbo* Quasi-Délit; Domat, liv. II, tit. VIII, sec. 4; Dareau, p. 419, ch. VIII; 11 Toullier, *verbo* Délit et Quasi-Délit, etc., etc., were cited in favor of the Plaintiff's pretensions.

Charles, infant son of Christian Wurtele. The application is resisted by the Bishop and Rector on the grounds mentioned in his affidavit, which states that his Lordship did not refuse to bury the Petitioner's child, but has always been ready and willing to perform the burial service over his body, at any church-yard, or burial ground, attached to any church belonging to the Church of England.

The parties have not questioned the power of the judges to entertain an application of this nature, and it will not therefore be necessary for me to enlarge upon the point. That they have such power is indubitable at the present day. Wherever a specific legal right exists, a legal remedy may be obtained from the proper court. And in a case like the present one, the writ of *mandamus* is the proper writ to issue.

On the application itself, I will observe that the right of burial, in the parish church yard, is a common law right recognised by the laws of every civilized country, as inherent in every parishioner, and is founded on a principle of humanity, becoming respect for the dead, and a proper regard for the safety of the living.

Before, however, referring to the other points in this case, I will remark that the provincial statute incorporating this company, confers, with reference to the question before us, no right on the Petitioner which he did not possess before. The Legislature, in incorporating this society, had no other object in view than that of endowing the association with the functions peculiar to corporations, without the slightest intention of interfering with the established rights of the different religious denominations, whose members might become shareholders therein. This is very clearly expressed in the following words : " To provide for the permanence of the establishment, " the decent preservation of the ground, and continued pro- " tection to the remains there committed to the earth."

Having thus expressed my opinion on this law, I must now say that after having given the question all the attention which its importance deserves, I find it impossible to grant the prayer of the Petitionner. The authorities which I shall now quote, place it out of our power. On referring to Burns' ecclesiastical law, *verbo* church, p. 323, the doctrine of the Church of England respecting consecration will be therein found at some length, and the ceremony of consecration particularly mentioned and described. This was not introductory of any new law or religious rites. If we look at the Edinburgh Encyclopedia, *verbo* Cemetery, p. 547, we shall find that it had existed for many centuries previous. The origin or cause is here said to be obscure, and that it was introduced about the year 590. But the continental writers trace its origin to the

earliest ages of Christianity, and when we are reminded that among the Romans, the words *loci religiosi* were applied to the ground in which bodies were interred, and that the ground then ceased to be *in commercio*, it is difficult to believe that the earlier Christians would have shown less respect for their dead than was shewn by the Pagans (1).

On what other grounds can we account for the privileges attached to cemeteries? In Comyn's Digest, *verbo* cemetery, we read : *Cœmeterium gaudet eodem privilegio quo Ecclesia.* Lind 256. And again : " If any smite or lay violent hands on " another, he shall be *ipso facto* excommunicated." It would be easy to refer to decisions during the reign of Queen Elizabeth, by which such punishments were inflicted.

So late as 1757, lord Mansfield, in the case of *Clark* vs. *Greaves*, stated this to be an indictable offense at common law, 1 Bur., 243. See also 1 Comyn's Digest, 183 D. In 1 Russell, on Crimes, p. 278, we read : " Affrays in a church-yard have " always been esteemed very heinous offences, as being very " great indignities to the divine Majesty, to whose worship " and service such places are immediately dedicated : and upon " this consideration, all irreverent behaviour in these places, " has been esteemed criminal by the makers of our law."

Such being the law, and bearing in mind that a portion of this cemetery has been consecrated by the Lord Bishop of the diocese, can we compel the Bishop to recognise, as part of the church-yard belonging to the Church of England, that part of unconsecrated ground in which the Petitioner is desirous of having his child buried ? I am of opinion that we cannot.

It has been argued, that by consecrating the ground, it would cease to be *in commercio*. I have no hesitation in saying that this consecration of the ground would not divest the Petitioner of his right of property therein. Whether dedicating the ground for the purpose of burying the dead therein, would have the effect apprehended, is a question which we are not at present called upon to decide. But I will observe that it is the Petitioner's own act, of which he has no right to complain.

MEREDITH, J. : The Rector of the parish, who is also the Bishop of the diocese, in the affidavit which he has made in answer to the rule served upon him, declares that there has been no absolute refusal on his part to bury the body of the Petitioner's infant son. On the contrary the Bishop asserts, and it is admitted that he would have allowed the interment at the place desired by the Petitioner if the latter would have consented to the consecration of the ground. His Lord-

(1) Burns, in which the writer mentions the convocation held so far back as 1661, and another in 1712, and 3 Phil., 276 and 295.

ship in the same affidavit further declares that a portion of the piece of land in this parish, known as Mount Hermon Cemetery, has been set apart for the burial of the dead according to the rites of the Church of England : and that the ground thus set apart has, with the consent of the Corporation owning the same, been consecrated as a place of interment by him as Bishop of the diocese. The Bishop is ready and willing to permit the interment of the body in the place thus set apart and consecrated.

The Petitioner will not consent to this, but insists on the body being buried in the ground that is not consecrated.

Viewed in this light, the question reduces itself to this. Can a clergyman of the Church of England, in a parish in which there is a burial ground set apart and consecrated by the authorities of his own Church, be compelled to bury the dead in a place that has not been sanctioned or approved of as a burial ground by the authorities of that Church ?

No case that has been cited, or that I have been able to find, would justify us in answering this question in the affirmative.

The 68th canon of the Church ordains that no minister shall refuse or delay to bury any corpse that is brought to the Church or church-yard. The book of common prayer requires the clergyman to meet the corpse " at the entrance of the " church-yard." Burns, in his work on Ecclesiastical law, vol. I, p. 261, says : " Burial in the parish church-yard is a com- " mon law right inherent in the parishioners." And in *ex parte* Blackmore, 1 Barn. and Ald., p. 122, judge Littledale said : " The clergyman is bound by law to bury the corpses " of the parishioners in the church-yard."

It does not however follow that, because a clergyman of the Church of England is bound by law to perform the burial service in the parish church-yard, which in England, in every case, is set apart as such with the sanction of the authorities of his Church, he can be compelled to perform that duty in a place which has not been set apart as a burial ground with the sanction of those authorities.

In each of the cases cited by the learned counsel who argued this case, or to which I have been able to refer, the burial ground in which the applicant sought to cause the interment to be made was a burial ground set apart and used as such with the consent of the ecclesiastical authorities ; and in this important particular the present case differs from all those cited.

Were we to grant the present application, we should, as far as depends upon us, indirectly, but most effectually, divest the Church of England of the authority which it has at all

time possessed of determining upon the places that ought to be set apart for the burial of the dead, who have died in the communion of that Church. Such a determination might not in this particular case be productive of inconvenience, but I apprehend that its general results might be very injurious, not only to the Church but to the community at large. I abstain from entering into any argument on this point : for so far as regards the application before us, it is sufficient to observe that as the applicant calls upon the Rector of the parish to perform a particular duty in a particular manner, it is incumbent upon him to show that the law requires that duty to be done in that manner ; and in my opinion, the applicant has not succeeded and could not succeed in establishing this.

In connection with this part of the case, it may be observed that in England " burial in the church-yard, " as has been shown, " is a common law right inherent in the parishioner. " The obligation in England on the part of the Rector of a parish to bury in the parish church-yard is the necessary consequence of the parishioner's right of sepulture in that particular place. The right of the applicant in the present case to inter the body of his infant son in the unconsecrated portion of Mount Hermon Cemetery is clearly not a common law right : it is a right founded merely on a contract between him and the owners of that place : and although that contract may give him a right of sepulture there, it cannot impose upon third parties, viz : upon the clergy of the Church of England in this parish, an obligation to attend at that place.

As to the Statute 12th Vic., cap. 191, incorporating certain persons and their successors, under the title of the Mount Hermon Cemetery, " it is sufficient to observe : 1st that that statute was not intended to impose, and does not impose any new obligation on the clergy of the parish : and 2nd that it had not the effect of making the pieces of land described in it, a church-yard or place of burial within the meaning of the canon of the Church of England which requires the clergy of that Church to bury the dead.

As in the affidavit which has been produced on the part of the applicant, it is declared " that the ceremony of consecra- " tion is not required by any of the canons of the Church of " England, " and as that ceremony is the cause of the difference upon which it is now our duty to decide, I deem it fitting to refer to some works in which that ceremony is spoken of.

In 1 Jacobs Law Dict., p. 453, we read : " A Church to be " adjudged such in law, must have administration of the sa- " craments and sepulture annexed to it. The manner of foun- " ding Churches in ancient times was after the founders had

" made their application to the Bishop of the diocese, and had " his license, the Bishop or his commissioners set up a cross " and set forth the church-yard, where the church was to be, " built, and then the founders might proceed in the building " of the church; and when the Church was finished, the Bishop " was to consecrate it, and then and not before the Sacraments " were to be administered in it. But by the common law and " customs of this realm, any person who is a good Christian " may build a church without license from the Bishop so as it " is not prejudicial to any ancient Church, though the law " takes no notice of it as a church until it is consecrated by " the Bishop, which is the reason why " church " and " no " Church " is to be tried and certified by the Bishop. " The writer then describes what he says were " ancient ceremonies " in consecrating the ground on which the church was intended " to be built, and of the Church itself when it was built. " He adds : " The form of consecration was left to the Bishop, and " is at this day. " The same author says : " The church-yard is " a common place of burial for all the parishioners. "

Burns, vol. I, p. 258, says : " About the year 750, spaces of " adjoining the churches were carefully enclosed and solemnly " consecrated, and appropriated to the burial of those who had " been entitled to divine service in those churches. "

These authorities elucidate the maxim : " *Cœmeterium gau-* " *det eodem privilegio quo Ecclesia.*" This maxim, in the most important matters, was given effect to by the Statute law of England, as will be seen by a reference to the 32d Hen. VIII, cap. II, by which criminals were allowed to take refuge and sanctuary in the church-yard for the same time, and with the same effect in law, as if they took refuge in the church itself.

Blackstone also, vol. IV, p. 14, and s. 9, speaks of the churches and church-yards as being consecrated. He says: " All affrays in a church or church-yard were esteemed very " heinous offences as being indignities to him to whose service " those places are consecrated."

And to come down as it were to the present day, we find that in the act of the Imperial Parliament 10th and 11th Vic., ch. LXV, known as " the cemeteries clauses act," provision has been made, most carefully, for the consecration of the parts of public cemeteries set apart for the burial of the dead according to the rites of the Church of England.

The 23rd section of that statute is in these words : " The " Bishop of the diocese, in which the cemetery " (that is any cemetery to be established under the act) " is situated, may, " on the application of the company, consecrate any portion " of the cemetery set apart for the burial of the dead accor- " ding to the rites of the established Church, if he be satisfied

" with the title of the company to such portions, and thinks " fit to consecrate such portions, and the part which is so " consecrated shall be used only for burials according to the " rites of the established Church." (1)

These authorities satisfy me that, although as stated in Mr. Wurtele's affidavit, the ceremony of consecration is not required by any of the canons of the Church, yet that it is in accordance with the principles of the Church of England, and is generally observed by that Church.

I therefore think that there is nothing unreasonable or oppressive on the part of the Bishop of Quebec in requiring the clergy under his authority to observe this command, wherever the observance of it is possible. There have been, and are cases, where, owing to particular circumstances, its observance is impossible, but to those cases the maxim *impossibilium nulla obligatio est*, is applicable.

Upon the whole I am of opinion, that a clergyman of the Church of England, in a parish in which there is a burial ground set apart and consecrated by the authorities of his own Church, cannot be compelled to bury the dead in a place that has not been so set apart and consecrated; and I therefore concur in the judgment discharging the rule. (1 *D. T. B. C.*, p. 414.)

STUART A., for Petitioner.

BLACK, Q. C., for Bishop of Quebec.

ENREGISTREMENT.—TESTAMENT.

COUR SUPÉRIEURE, Québec, 13 octobre 1851.

Présents : BOWEN, Juge en Chef, DUVAL, et MEREDITH, Juges.

DUCHESNAY, Demandeur, *vs.* BEDARD, Défendeur, & CAMPBELL, Opposant, & BEDARD, Opposant.

Jugé : Que d'après la 4e Vic., ch. xxx, tous testaments "faits et publiés" avant le 31 décembre 1841, doivent être enregistrés pour conserver aux légataires leur rang d'hypothèque.

(1) See also, 56 Geo. III, ch. CXLI, entitled : " An act for enabling " ecclesiastical corporations, under certain circumstances, to alienate lands " for enlarging cemeteries." The preamble is on these words :

" Whereas cemeteries, church-yards and burying grounds are in various " places found to be too small, and the same *cannot be* conveniently *enlarged* " without appropriating for consecration some parts of the lands belonging " to corporations etc., etc.," and by the " enacting part, certain corporations " are empowered to sell *for the purpose of the consecration* such land as may " be necessary for enlarging any such cemetery, church-yard or burying " grounds, etc., etc.,"

Les immeubles du Défendeur avaient été vendus judiciairement par le shérif. Bedard, l'Opposant, réclamait en vertu d'un testament de 1807, enregistré en 1849, et par le projet de distribution était colloqué par le montant réclamé. L'Opposant Campbell réclamait hypothécairement sur le produit des immeubles, en vertu d'un titre qui datait de 1839, enregistré antérieurement au 1 r novembre 1844, et contestait la collocation de Bedard, attendu son défaut d'enregistrement dans les délais voulus par la loi.

CHABOT, au soutien de cette contestation, cita l'Ordonnance de la 4e Vic., ch. XXX, sec. 4. La réclamation de Bedard est une de ces " réclamations hypothécaires " qui, d'après la 4e section de l'acte, doivent être enregistrées. Toute la question est de savoir si cette Ordonnance a un effet rétroactif. La cour l'a décidé solennellement dans la cause de *Tremblay* vs. *Bouchard*, et Simon, Opposant (1).

TASCHEREAU, pour l'Opposant Bedard : En référant à la première section de l'Ordonnance citée, on y trouve que " tous testaments qui seront faits et publiés par aucun testateur ou testatrice qui décédera après le dernier jour mentionné " (31 décembre 1841) devront être enregistrés suivant les dispositions de cette loi. On ne trouve nulle disposition analogue dans la 4e section, d'où je conclus que les testaments " faits et publiés" antérieurement au 31 décembre 1841, ne sont pas soumis à la formalité de l'inscription pour conserver leur rang d'hypothèque: or, le testament en vertu du quel Bedard réclame, porte date de 1809. Jugement maintenant la contestation de Campbell. (1 *D T. B. C.*, p. 435.)

CHABOT et DELAGRAVE, pour Campbell.

TASCHEREAU, pour Bedard.

DEPENS.—NOUVEAU TARIF.

SUPERIOR COURT, Montreal, 26 mars 1851.

Before SMITH, VANFELSON, and MONDELET, Justices.

TUNSTALL, Plaintiff, *vs.* ROBERTSON, Defendant.

Jugé : Que dans les actions intentées avant la mise en force du nouveau tarif, mais dans lesquelles jugement a été rendu subséquemment, les frais doivent être taxés selon l'ancien tarif.

Motion to revise the taxation of a bill of costs. The action had been instituted before the coming into force of the new tariff, and the question which arose was whether the taxation

(1) V. *Girard* vs. *Paquet* et *Tremblay* vs. *Bouchard* et *Simon*, 2 R.J.R.Q., p.21.

of VANFELSON, Justice, under the old tariff, should be affirmed or set aside.

E. CARTER, in support of the motion, contended, that, inasmuch as no provision had been made in the Judicature Act for cases of this kind, the taxation ought to be under the tariff existing at the time of rendering judgment, and not of one which had ceased to have any existence.

CARTIER *contra* contended, that the new tariff could not have a retroactive effect, but had only aprospective operation, as was evident from the language of the act itself. The Judgment was only a consequence of the action, regulating the rights of parties, but not creating them: those rights were fixed form the time of the first appearance of the parties in court, in the same way as interest, which ran from the moment of the bringing of the action, If, during the process of a suit, the rate of interest were reduced from 5 to 4 per cent, would it be pretended that the rights of the parties, would be affected in the same ratio? The new tariff not being *en détail* but *en bloc*, rendered it impossible to divide the costs, or to substitute one tariff for the other in cases commenced before the new tariff came into operation.

MONDELET, Justice, dissenting: I am of opinion that the old tariff ceased to exist from the moment the new tariff came into operation, and that, therefore, however hard it may be that an attorney who has paid £2 5s. fees to the prothonotary shall get back only £1 10s., still the court cannot act upon a scale of fees which has no existence.

SMITH, Justice, giving the judgment of the court, said: When a client goes to a lawyer, a *quasi* contract is created between them, that the client shall repay the fees which the lawyer pays to the officers of the court. This contract, then, cannot be changed by a subsequent alteration of tariff, because the right to recover costs is but an accessary to the principal action. It does not arise out of the Judgment, nor out of the taxation, but out of the principal obligation which is only enforced by the Judgment. The taxation under the old tariff is, therefore, affirmed (1). 1 *D. T. B. C.*, p. 476.)

CARTER and CARTER, for Plaintiff.

CARTIER and CARTIER, for Defendant.

(1) *Vide* 2 *R. T. R. Q.*, p. 418, and the same rule has been adopted in the District of Quebec.

PROCEDURE.—COMPENSATION.

BANC DE LA REINE, EN APPEL, Montréal, 12 juillet 1851.

Présents : ROLLAND, PANET, et AYLWIN, Juges.

GUGY, Défendeur en Cour Inférieure, Appelant, *vs.* DUCHESNAY, Demandeur en Cour Inférieure, Intimé.

Jugé : Que la compensation doit être invoquée d'une manière expresse, et que les conclusions d'un plaidoyer à cet effet doivent demander que la compensation soit déclarée, par la cour, avoir eu lieu.

L'action était en recouvrement d'une somme de £168-9-0 montant d'un billet promissoire par l'Appelant en faveur de l'Intimé.

L'Appelant opposa à cette demande une exception alléguant d'abord le paiement d'une somme de £48. 2s. qui fut admis par le Demandeur ; et, quant à la balance, l'Appelant alléguait " qu'icelle était compensée par une plus forte " somme que le Défendeur avait droit d'exiger du Demandeur, " pour les causes énoncées au plaidoyer. Le plaidoyer se terminait ainsi :

" Qu'ainsi le montant réclamé par le dit Demandeur est " compensé et éteint ; c'est pourquoi le dit Défendeur conclut " à ce que l'action du dit Demandeur soit déboutée, avec " dépens."

Le jugement rendu sur l'appel, tout en déclarant mal fondé en fait le plaidoyer du Défendeur, énonce l'insuffisance des conclusions de l'exception plaidée par le Défendeur.

" La cour, considérant que la défense de l'Appelant à l'action du Demandeur était fondée sur un prétendu droit de garantie, résultant d'une vente faite à l'Appelant par l'Intimé, pour lui et ses frères et sœurs, de certains lots de terre avec mention qu'une partie des lots non désignée avait été vendue par un nommé Charles Archambault, comme procureur des présents vendeurs, et que, quant à ceux-ci, l'Appelant s'en tiendrait aux prix de telles ventes pour être par lui reçus de qui de droit ; et sur un allégué, que l'Intimé avait frauduleusement reçu partie d'un prix de vente ainsi faite par le dit Charles Archambault, savoir, du nommé Peter McNaughton, et nommément une somme de quatre-vingt-sept livres dix schellings cours actuel, dont l'Intimé était tenu de lui tenir compte ; d'où il inférait que la dette réclamée par l'Intimé était compensée et éteinte, concluant à ce que l'action de l'Intimé fût déboutée ; que cette défense n'était et ne pouvait être une exception de compensation, puisqu'elle n'était pas basée sur l'existence d'une dette claire et liquide, et qu'il n'y avait pas non plus de conclusions à cet égard, était d'ailleurs vague et insuffisante puis-

qu'il n'était pas allégué que la vente faite par le dit Archambault au nommé McNaughton, de qui l'Intimé avait reçu les dits deniers à compte d'un prix de vente, était ainsi faite par le dit Archambault comme procureur des vendeurs du dit Appelant, ce qui n'était pas non plus le cas ; que, d'ailleurs, il paraît en preuve que la vente par le dit Archambault, au dit McNaughton, fut faite en vertu d'une procuration de personnes autres que l'Intimé, et ses frères et sœurs, au nombre desquelles se trouve nommé le présent Appelant avec son épouse, pour lesquelles autres personnes le dit Intimé paraît avoir reçu les dits deniers ; de plus, que la somme payée à l'Intimé ne se montait pas aux quatre dixièmes du prix et des intérêts dus à ces autres vendeurs, à qui il en était comptable, et l'est encore s'il ne s'est pas acquitté envers eux, n'y ayant aucune aliénation par le dit Intimé, ni ses frères et sœurs, des six dixièmes du lot en question, par eux vendus à l'Appelant, qui puisse nuire à ce dernier dans l'exercice des droits qui lui ont été cédés par l'acte du trente mars mil huit cent quarante-sept ; que, par conséquent, il n'y avait pas lieu à compensation, non plus qu'à plaider l'extinction de la dette réclamée par l'Intimé, ou la fraude dont est parlé dans les défenses, a débouté et déboute l'Appelant de son présent appel ; et le jugement dont est appel, nommément le jugement de la Cour Supérieure, rendu en cette cause le seize décembre mil huit cent-cinquante, demeure confirmé dans son dispositif pour la somme adjugée à l'Intimé, sauf aux parties tel recours qu'elles aviseront. (1 *D. T. B. C.*, p. 478.)

GUGY, pour l'Appelant.

DRUMMOND et LORANGER, pour l'Intimé.

LETTRES-PATENTES.—PROCEDURE.

BANC DE LA REINE, EN APPEL, Montréal, 11 octobre 1851.

Présents : ROLLAND, PANET, AYLWIN, Juges.

LES PRINCIPAUX OFFICIERS DE L'ARTILLERIE, Appelants, *vs.* ELIZABETH TAYLOR et al., Intimés.

Jugé : 1° Qu'il n'est pas nécessaire de procéder par *scire facias* pour obtenir la révocation ou annulation de lettres patentes, et que dans le cas actuel, la couronne, représentée par les Appelants, pouvait renoncer au privilège du *scire facias*, et demander par les voies ordinaires la nullité de certaines lettres patentes, octroyant concession de terres incultes, sur lesquelles les Intimés ont fondé leur action. (1)

2° Qu'un Défendeur peut, par exception, opposer la nullité du titre

(1) V. art. 1035 C. P. C.

invoqué par la partie adverse, et conclure en conséquence sans être obligé de se pourvoir par action directe, ou par demande incidente, en rescision de ce titre.

L'action des Intimés était une action en revendication de partie de certains lots de terre situés dans le township de Grenville dont les Appelants étaient en possession. Le titre des Intimés à la propriété des lots revendiqués reposait sur des lettres patentes, en date du 21 mars 1822, accordées par le gouvernement de cette province au lieutenant colonel George Taylor, et sur d'autres lettres patentes accordées par le même gouvernement aux nommés John Hazelton et Frs Jos. Jackson. Par ces lettres patentes, les lots dont partie était revendiquée avaient été octroyés, partie au lieutenant colonel Geo. Taylor, et partie à Hazelton et Jackson. Ces derniers avaient ensuite vendu les lots ainsi octroyés au premier, qui mourut plus tard en possession de la totalité des lots dont les Intimés, ses enfants, avaient hérité.

A cette demande, les Appelants plaidèrent en résumé dans les termes suivants:

" The Defendants, for peremptory exception say, that, long " before the letters patent in said declaration partly recited " were issued, to wit, on the first day of June, 1819, a navi- " gable canal and public work for the military defence of " Lower Canada, was projected on behalf of his late Majesty, " King George the Third, to extend from lot n° 9, in the first " range of lots of the township of Grenville along the front " of the said township, and along the front of part of the " adjoining township of Chatham, on the river Ottawa, and " that the lands required for that purpose, were laid out, and " occupied for that purpose, or were intented so to be, that, " in particular, the portions of the lot of land numbers two, " three and four, in the first range of lots of the township of " Grenville, of which Plaintiffs seek restitution, had been laid " out, and occupied, and that certain excavations, embank- " ments and other work and labour, had been, and were " intended to be done, in the construction of the canal; that " Geo. Taylor, did, on the fourth day of March, one thousand " eight hundred and nineteen, by his petition to the governor " in consideration of his military services, pray for a grant of " the waste lands of the crown; that, on the 8th day of July, " 1820, it was ordered, that the lots of land, in the said let- " ters patent mentioned, should be granted to George Taylor, " upon condition that it should be lawful for His Majesty, to " take such part, for the purposes of a canal and the banks " thereof, as he should see fit, without any indemnification or " remuneration that while the said canal was being perfected, " the said letters patent were by error issued, on the 21st day of

" March, 1822, upon the false, and fraudulent representations of " George Taylor, without containing the aforesaid conditions, " and Defendants further say, that said canal from, and since " the year 1835, has been used for the purposes of navigation, " of the military defence of the said provinces, and for other " public purposes.

" Wherefore, Defendants pray, that the said letters patent, " and the said grant of the said lots of land thereby made, " may, as to the said parts and parcels the possession whereof " the said Plaintiffs seek the recovery, and which belong and " are necessary for the use, navigation and purposes of the " said canal, be annulled, and that said action be dismissed."

JUGEMENT DE LA COUR DE PREMIÈRE INSTANCE.

" The court, considering that the letters patent under the " great seal of the Province of Lower Canada, cannot, by " reason of any thing in the said exception set forth, and by " law, be annulled and set aside in manner and form as the " said Defendants have concluded and prayed for; that the " said letters patent can only be annulled and set aside by " judgment on a writ of *scire facias* for repealing the same: " the said exception is declared and adjudged to be insufficient " in law to prevent or bar the Plaintiffs from having and " maintaining their action in that behalf, and is hence dis- " missed."

Les Défendeurs ayant appelé de ce jugement, soutenaient qu'il devait être infirmé: parce qu'ils avaient le droit d'opposer la nullité des lettres patentes par exception, sans avoir recours à une action directe; et parce que le writ de *scire facias* était une des prérogatives de la Couronne, et qu'elle pouvait n'en pas user et recourir aux voies ordinaires.

La Cour d'Appel donna gain de cause aux Appelants par le jugement dont suit la teneur:

" The court, considering that, under the 33rd section of the " statute of the 7th year of Her Majesty's reign, ch. XI, it is " lawfull for the principal officers of Her Majesty's Ord- " nance, to claim, exercise and enjoy all the same rights, pri- " vileges and prerogatives, which have been heretofore " claimed, exercised and enjoyed in any suits, actions or other " proceedings whatsoever, in the same manner as if Her Majesty " were actually made party to the suit; and considering that " it was fully competent to Her Majesty to waive in this cause, " if directly made a party to the same, the remedy which by " law she hath, as her royal prerogative, to repeal letters " patent by writ of *scire facias* and to adopt the common " remedy open to all her subjects in this behalf, and that the

" Appelants, by their pleadings in the court below, have " pursued such remedy: it is adjudged, that the judgment " appealed from, be, and the same is hereby reversed; and the " court proceeding to render such judgment as the court " below ought to have rendered, it is ordered, that the parties " do proceed to the adduction of evidence before the said court, " on their respective pleadings and the issues of fact thereupon " raised and perfected."

En rendant ce jugement, la Cour d'Appel par l'organe de son président, maintint que l'exception péremptoire à laquelle se trouvent jointes des conclusions de demande incidente, de la nature de celles plaidées en cette cause par les Défendeurs, doit être reçue; les Demandeurs, d'ailleurs, n'y avaient pas objecté, leurs réponses à ces exceptions étant générales. Quant à la procédure du *scire facias*, cette cour était d'opinion que c'était une prérogative de la Couronne qu'elle pouvait exercer ou ne pas invoquer, et dans ce dernier cas, elle avait droit, comme tous ses sujets, aux recours ordinaires pourvus par les lois du pays. (1 *D. T. B. C.*, p. 481.)

DRUMMOND et LORANGER, pour les Appelants.

MONTIZAMBERT et EASTON, pour les Intimés.

PROCEDURE.—PLAIDOYERS.

IN THE CIRCUIT COURT, Quebec, 29 Nov., 1851.

Before POWER, Circuit Judge.

CASEY *vs.* VILLENEUVE.

Jugé : Que la Défense au fonds en fait est abandonnée quand elle est filée avec un plaidoyer de paiement ou de compensation.

This was an action brought for the recovery of an amount due for goods sold and delivered, wherein the pleas of general issue and compensation were offered.

POWER, Justice : I cannot entertain both these pleas, and, if the Defendant persists in placing them both upon the record, it will be my duty, when the trial comes on, to disregard the general issue. Where, as with us, the law requires the proceedings to be in good faith, I have no doubt, a Defendant cannot legally answer a demand by two pleas, that contradict each other, one of which he must know to be false. All persons are morally obliged to adhere to the truth, and they whose conduct is so far at variance from their obligation as to come into court with prevarication on their lips (" unclean hands, " is the common metaphor), should be told : *Procul estote profani,* the temple

of the justice of your country is sacred to truth, and must not be thus openly defiled by the impurity of your breath. I took the opportunity in July last, when rendering judgment in the case of *McLean* vs. *McCormick* (see *ante* p. 369) of entering very fully into this important subject, and of tracing the origin and progress in our courts of the practice of inconsistent pleading, a practice which I then denounced as vicious and immoral. I have nothing now to add to what I then said, except that, since that time, I have been put in possession of a number of American decisions on this point, and of which I had no previous knowledge. It would be satisfactory to see those decisions reprinted in our Law Reports, so that they may be the more conveniently within the reach of every member of the profession. The books from which they are taken are not, it is true, generally quoted as having authority here; but, if reason and sound sense are entitled to any respect, those decisions must be of weight every where, and the Jurisprudence they contain is in perfect conformity to the spirit and principles of the French law. (1 *D. T. B. C.*, p. 487.)

GAUTHIER and LEMIEUX, for Plaintiff.

PENTLAND and PENTLAND, for Defendant.

DEPENS.—TARIF.

SUPERIOR COURT, Montréal, 22 juillet 1851.

Before DAY, SMITH, and VANFELSON, Justices.

DELERY, Plaintiff, *vs.* QUIG, Defendant, and DE BEAUJEU, Pltff., par Reprise d'instance, and QUIG, Opposant.

Jugé: Que la date de l'enfilure d'une opposition, règle le montant des frais; et que dans les cas où l'enfilure a eu lieu avant la promulgation du nouveau tarif, quoique le retour fût subséquent, les frais doivent être taxés d'après l'ancien tarif. (1)

Motion to revise Opposant's bill of costs, in accordance with the tariff now in force. The opposition (*à fin de distraire* not contested) had been filed at the sheriff's office before the coming into force of the new tariff, but was not returned till afterwards, and it was now contended that the date of the return must govern the costs, and not the date of the filing.

The court held that the institution of the action must be held to date from the filing, and that therefore the taxation under the old tariff was right. (1 *D. T. B. C.*, p. 493.)

BETHUNE and DUNKIN, for Plaintiff.

DOUTRE and LENOIR, for Opposant.

(1) See *supra*, p. 73, a similar case.

PROCEDURE.—EX PARTE.

SUPERIOR COURT, Montréal, 15 juillet 1851.

Before SMITH, and VANFELSON, Justices.

KERSHAW, Plaintiff, *vs.* DELISLE & al.

Jugé : Que lorsqu'un Défendeur a fait défaut de comparaître, et que tel défaut a été dûment enregistré, une motion pour procéder *ex parte* n'est pas nécessaire.

This was an action against the maker and against the endorser of a promissory note. The Defendants did not appear on the return day; whereupon, a certificate of default was filed, and the Plaintiff's Attorney proceeded to inscribe the case on the *Rôle de droit* for judgement *ex parte*, without making any motion for leave to proceed *ex parte*. When the cause was called from the *Rôle*, the prothonotary drew the attention of the court to the absence of the motion for leave to proceed *ex parte*, and a hearing was ordered touching the necessity of such motion.

At the argument, DAY, for the Plaintiff, contended that there was nothing in the new judicature act which required a motion to proceed *ex parte* to be made. The fact that the action itself was returned into the prothonotary's office, without the parties being called in open court, seemed to render such a motion still more unnecessary. It was a mere question of payment of a tax to the prothonotary, and, in the absence of any law, the court would not add this to the other burthens borne by suitors.

The court, by their judgment, held the motion to be unnecessary, and gave judgment against the Defendants, on the record as it stood. (1 *D. T. B. C.*, p. 494.)

J. J. DAY, for Plaintiff.

PROCEDURE.—TUTEUR.

SUPERIOR COURT, Montreal, 27 May, 1851.

Before VANFELSON and MONDELET, Justices.

MURRAY, ès qua., *vs.* GORMAN.

Jugé : Que dans une action portée par un tuteur à un mineur, il est essentiel que la déclaration contienne un allégué, que l'acte de tutelle, ou un sommaire d'icelui, a été enregistré.

Action brought by a tutor to a minor, in his quality, against

the Defendant, as testamentary executor of the will of one Patrick O'Reilly, to render an account.

The declaration alleged the appointment of the Plaintiff as tutor on the 25th April, 1848, but there was no allegation that the appointment had been enregistered.

The Defendant thereupon demurred, on the ground that the declaration contained no allegation, either that the appointment of the Plaintiff as tutor, or a memorial of such appointment, had been enregistered in the manner prescribed by the 24th section of the registry ordinance.

JUDGMENT : " Considering that, in and by the 24th section of the ordinance 4 Vict., ch. XXX, no action can be brought or maintained in the courts of this country, in the name, or on the part of any tutor or guardian to a minor or minors, until after a memorial of the appointment of such tutor shall have been registered in the manner prescribed by the said ordinance ; considering that it is essential that the registration of the appointment of such tutor should be alleged in the said tutor's declaration, and, namely, should have, but hath not been so alleged in this cause : considering, therefore, that the Plaintiff as such tutor hath not shewn, in and by his said declaration, that he hath such right of action, as aforesaid, the court maintains the said Defendant's *défense en droit*, and doth dismiss the Plaintiff's action, saving to the Plaintiff his recourse as he may be advised." (2 *D. T. B. C.*, p. 3.)

DRUMMOND and LORANGER, for Plaintiff.

DAY, for Defendant.

TESTAMENT.—PREUVE.

SUPERIOR COURT, Montreal, 13 octobre 1851.

Before SMITH, VANFELSON and MONDELET, Justices.

CLARKE *vs.* CLARKE et al.

Jugé : Que le certificat d'un notaire, quant à l'état mental d'une personne à l'instant où elle fait son testament, qu'elle était saine d'entendement, est purement de style, et que cet énoncé peut être contredit par témoignage verbal : le notaire qui exécute un testament n'est pas tenu d'écrire l'original ou la minute de tel testament de sa propre main. (1)

This case came before the court upon a motion to revise a ruling given at the *enquête*.

The action was brought to set aside a will, on the ground

(1) V. art. 831 et 1234 C. C.

of suggestion, and, as being made by the testatrix, at a time when she was not *saine d'entendement.*

At the *enquête,* the two notaries by whom the will was executed were brought up by the Plaintiff, and questions put to them as to the state of mind of the testatrix at the time of making her will whether she was assisted by any and what papers or writtings, and as to who wrote the original or minute of the will. These questions were objected to, and the objection maintained by the presiding judge.

McKay, for Plaintiff: The words *saine d'entendement* which the notaries have used in the will, are merely *de style,* and may be disproved by parol evidence; the ordinance of 1667 does not exclude notaries from being witnesses; by the question, " who wrote the original of the will ? " the Plaintiff does not attack any declaration of the notaries; the law does not require either of the notaries to write the will: according to the best authorities, where fraud is alleged, or, as, in this case, fraud and suggestion, a great latitude is allowed, and even notaries may be examined as witnesses. (1)

Smith, Justice: One proposition in this case is, whether the certificate of a notary as to the state of mind of a party, can be contradicted by parol evidence. The court is of opinion that it can. Then, if evidence is admissible on this fact, the question comes up, are the notaries themselves competent as witnesses ? This question will be found fully discussed in 9 Toullier, n°s 312, 313. From the time of Danty, up to the time of Toullier, the declaration of the notaries as to the state of mind of a party was regarded as mere matter of *style,* and susceptible of being disproved by verbal evidence. All the authorities concur on this point. It is true that the chancellor d'Aguesseau, took a different view, based on what he supposed to be public policy, but Toullier has taken up the arguments of the chancellor, and conclusively shewn them to be unfounded. The rule, as established by Toullier, Merlin, and other jurists is, that notaries are competent to give evidence where what they testify does not fall within the scope of what they are bound to do by law. Here they were not bound by law to make the declaration in the will touching the sanity of the testatrix, nor were they, nor either of them, bound actually to write the original will, and the judgment pronounced at *enquête,* must be overruled.

Vanfelson and Mondelet, Justices, concurred, the latter remarking that the result of a close examination of the autho-

(1) Dénizart, *verbo* notaire ; 9 Toullier, n°s 312 et 313 ; Article 289, Custom of Paris.

rithies, had led him to change the opinions formerly expressed by him, in this case, at the *enquête.* (1) (2 *D. T. B. C.*, p. 11.)

McKay, of Counsel for Plaintiff.

Cross, Attorney, for Defendants.

PREUVE.—ENQUETE.

Superior Court, Quebec, 1851

Before Meredith, Justice.

The City Bank, Plaintiff, *vs.* Coles, Defendant, and The City Bank, Opposant, and Boswell, Opposant.

Un témoin peut se servir d'une déposition par lui déjà faite, ou cette déposition peut lui être lue, sur son examen subséquent, même dans une procédure différente, pour lui rafraîchir la mémoire.

At the *enquête,* upon the contestation of the City Bank's Opposition, by the Opposant Boswell, a witness was called to prove the delivery of a parcel to the Defendant upon a particular day. He stated that he delivered the parcel in question either to the Defendant, or to Mr. Gethings, the cashier, but could not say positively to which; he thought it was most likely he had delivered it to the Defendant Coles himself; and the witness added, that it was on account of the lapse of time that he could not then speak positively upon the subject.

Holt, on the part of the Bank, then proposed, by way of refreshing the witness' memory, to place in his hands his deposition, relative to the same matter, taken upwards of a year previously, and about six weeks after the delivery of the parcel.

Ahern, on behalf of the Opposant Boswell, objected.

Meredith, J., ruled, referring to 1 Greenleaf, on Evid. 436 *et seq.*, and to 1 Esp. N. P. Rep. 439, *Vaughan* vs. *Martin*, that the deposition might be read to the witness.

Lord Kenyon (in *Vaughan* vs. *Martin*) said that "he "would take the deposition to be in the nature of a memo- "randum made at the time, which would be evidence to which "the witness might recur to refresh his memory; and that "he therefore would allow the deposition to be read to the "witness, and him to be asked, if the matters there stated "were true." (2 *D. T. B. C.*, p. 16.)

Holt & Irvine, for the City Bank.

Ahern, for Opposant Boswell.

(1) V. la cause de *Clarke* vs. *Clarke & al.*, 2 R. J. R. Q., p. 345.

SHERIF.—RESPONSABILITE.

SUPERIOR COURT, Montreal, 13 October, 1851.

Before DAY, SMITH and MONDELET, Justices.

STEVENSON et al *vs.* BOSTON et al.

Dans une action intentée par l'imprimeur de la *Gazette de Québec*, publiée par autorité, contre le shérif, pour le coût des avertissements de décrets publiés dans la dite *Gazette, jugé*, que le shérif seul est responsable, et qu'il n'existe aucun contrat entre l'imprimeur et les parties à la poursuite desquelles les immeubles saisis sont décrétés. (1).

This was an action brought by the representatives of the Queen's printer, against the Defendants, joint sheriff of the district of Montreal, to recover the sum of £500, for printing and publishing notices and official advertisements in the Quebec Gazette, by authority.

Defendants pleaded, in effect, that, in their capacity of sheriff, they were bound to cause all notifications and advertisements, respecting sales of real estate, to be printed and published in the Quebec Gazette, by authority, and that the Queen's printer was bound to print and publish therein all such notifications and advertisements during the period required by law : that, in the present instance, the advertisements for the price of which they were sued, were such advertisements as they were bound by law to insert in the Official Gazette ; and, as the Queen's printer was bound to print and publish, and that they in no wise contracted with or employed him, the Queen's printer, as touching the same, but that the same was, in fact, done by the Queen's printer in performance of his official obligations and not for the use or benefit of the Defendants, but solely for the use and benefit of the parties to the causes wherein such sales were to take place, and who were alone liable to pay therefore : that they had paid over to the Plaintiff, on account of his fees for the insertion of the said advertisements, the sum of £83-2-6, and that, since the institution of the present action, there had come into their hands, on account of the same, a further sum of £96-3-3, which they had always been willing to pay over to the Plaintiffs : that, making deduction of these two amounts, there still remained due a balance of £135-14-8, which had never come into their hands, and which they were not liable to pay.

DAY, Justice, in rendering judgment, observed : At the argument of this case it was suggested, that the sheriff acted in these matters merely as the *huissier* acted in France, as the

(1) V. art. 648 C. P. C.

mandataire of the parties to the causes wherein the sales took place, who are substantially the debtors, and to whom the printer must look. On looking into the whole of the proceedings by which land is brought to sale in this country, however, and comparing them with the system in France, it is plain that there is no analogy between the two, and that we must look to our own statute law for the general reasons which govern this case. By the ordinance, 25 Geo. III, ch. II, sec. 23, the mode is pointed out by which the sheriff is to proceed to sell lands taken in execution, and the duties, there made imperative on the sheriff, include the advertising of the property. This would seem to make it a contract between the sheriff and the printer, since the sheriff could alone call on the printer to perform that duty. But, on referring to the statute, 6 Will. IV, ch. XV, sec. 25, we find the law stated in very clear terms, it being declared that the sheriff, on the receipt of any writ of *fieri facias de terris, venditioni exponas*, or *alias* writ of *fieri facias*, is entitled to demand from the person presenting the same the sum of 20s. in advance, to defray the expenses of publication. This shows the intention of the Legislature to make the sheriff liable. Moreover, the universal practice of the sheriff indicates that the contract is between him and the printer, as he has always, after deducting the sum from the amount levied, put it among his own particular charges. If the law were not so, great injustice, as well as inconvenience, might result, as the sheriff has the means to cover himself from loss, whereas the printer has none: there is no privity of contract between the printer and the Plaintiff, and if the law were to deny the printer a remedy against the sheriff, it would deny him all remedy whatever. It is true that this may seem hard on the sheriff, but it is one of the contingencies of his office, and he must look to the Legislature to relieve him from it.

Judgment for Plaintiff for balance sought to be recovered. (2 *D. T. B. C.*, p. 17.)

ROSE & MONK for Plaintiff.

BETHUNE & DUNKIN for Defendant.

PROCEDURE.—SAISIE D'IMMEUBLE.

COUR SUPÉRIEURE, Montréal, 13 janvier 1852.

Présents : DAY, SMITH et MONDELET, Juges.

BOYER *vs.* SLOWN *et al.*

Jugé : Que sur saisie réelle, l'absence de recors, d'élection de domicile du saisissant et de l'huissier, de mention de l'avant ou de l'après-midi,

et du commandement de payer, lorsqu'il a eu lieu sur exécution contre les meubles, n'est pas cause de nullité. (1)

Que le certificat du shérif que les annonces et publications ont été faites, fait foi jusqu'à ce que tel certificat ait été déclaré faux. (2)

Que faute de s'être opposé dans le temps fixé par le Statut 41 Geo. III, ch. VII, sect. 11, le saisi est pour toujours forclos du droit d'invoquer les nullités de la saisie de ses immeubles, ainsi que des procédés qui y ont rapport. (3)

La demande, signifiée le 25 février 1845, était au pétitoire, revendiquant deux lots de terre acquis par le Demandeur, suivant titres produits, et alléguant l'injuste détention d'iceux par les Défendeurs. Ces derniers opposèrent à cette demande une exception péremptoire, par laquelle, tout en admettant que le Demandeur avait été propriétaire de ces deux immeubles, ils mettaient en fait qu'il avait cessé de l'être, et que la propriété en était passée aux Défendeurs ; qu'en vertu d'un bref d'exécution, émané contre les immeubles du Demandeur, sur un jugement rendu contre lui, dans la Cour du Banc de la Reine du district de Montréal, à la poursuite de John Boston, les susdits lots furent saisis, et le 30 avril 1839, furent adjugés et vendus au dit John Boston, qui en devint propriétaire, et en obtint la possession légale. Que John Boston avait ensuite, par deux actes distincts, vendu à chacun des deux Défendeurs un des susdits lots, qu'ils possédaient ainsi à juste titre, et que la demande ne pouvait être maintenue, et ils en demandaient, en conséquence, le renvoi. Par un second plaidoyer, les Défendeurs plaidaient qu'ils ne possédaient pas conjointement, mais séparément, chacun, un des deux lots revendiqués.

Par sa première réponse, le Demandeur prétendit que la saisie des immeubles, tous les procédés subséquents, ainsi que l'adjudication faite à John Boston, étaient nuls, n'ayant pas été accompagnés des formalités essentielles, imposées par la loi pour la validité de l'expropriation forcée, et il énonçait les raisons suivantes : " parce qu'il n'appert pas, par le rapport du " shérif, fait sur le procès-verbal de l'huissier Robert Lowell, " que le dit huissier, chargé par le shérif de ce district, d'exé- " cuter le bref, ait fait, au nom du saisissant, l'élection de do- " micile voulue par les ordonnances et l'usage suivis en ce " pays, dans la paroisse où la dite saisie a été faite, non plus " qu'aucune élection de domicile quelconque ; " parce que le dit " huissier n'a pas fait au Défendeur, préalablement à la dite " saisie, de commandement de payer les sommes d'argent por-

(1) V. art. 638 C. P. C.

(2) V. art. 697 C. P. C.

(3) V. art. 714 C. P. C.

" tées au bref ;" parce que ce procès-verbal et rapport ne font " point voir, que le dit huissier se soit fait accompagner de " recors pour pratiquer la dite saisie ;" " parce qu'il n'appert " point que le dit huissier ait laissé au saisi copie du procès- " verbal de la saisie ;" " parce qu'il n'appert point, par le procès- " verbal de saisie réelle, si la saisie a été faite dans l'avant ou " l'après-midi ;" " parce que le procès-verbal ne fait point men- " tion des sommes d'argent pour lesquelles la saisie a été faite ;" " parce que la dite saisie ne comporte aucune date certaine ;" " parce que le rapport du shérif ne fait point mention que la " vente ou l'adjudication des immeubles en question, aient été " annoncées en temps et lieu opportuns, et notamment ne fait " point voir que la dite vente et adjudication ont été annoncées " un dimanche, à l'issue du service divin, qui est le temps " prescrit par la loi pour la validité de telle annonce, comme " devant avoir lieu à la porte de l'église de la paroisse, où sont " situés les immeubles."

Pour toutes ces raisons le Demandeur alléguait que John Boston n'avait pu acquérir aucun droit de propriété sur les immeubles revendiqués, et il concluait, à ce que les dites saisie, vente et adjudication, et procédés y relatifs, fussent déclarés nuls et l'exception déboutée.

Par une réplique spéciale, les Défendeurs disaient que toutes les formalités requises avaient été observées, et que la saisie, et tous les procédés y relatifs, avaient été faits au vu et su du Demandeur, qui n'y avait fait aucune objection, mais y avait donné son assentiment, ne s'était jamais pourvu à cet égard contre John Boston, mais, au temps de telle vente par décret, y avait acquiescé.

Le Demandeur admit qu'il était présent lors de la vente et adjudication à Boston, et les Défendeurs produisirent le bref d'exécution émané contre les meubles du Demandeur, à la poursuite de Boston, avec le procès-verbal de *nulla bona*, signé par le dit Demandeur avec son consentement sous croix, en présence de témoins, aux fins de procéder à la saisie de ses immeubles.

DAY, juge : Tous les faits étant admis, il s'agit d'examiner les informalités, et de voir si elles sont de nature à vicier la vente. Je dois dire d'abord qu'en France, aussi bien qu'ici, toutes les objections fondées sur des informalités sont regardées bien défavorablement, et que la règle suivie par les cours est de maintenir, plutôt que d'infirmer, les procédures judiciaires, et c'est pour obéir à cette règle que les moindres actes sont pris pour des renonciations *(waivers)* à se prévaloir de ces informalités. Dans le cas actuel, les informalités invoquées peuvent être réduites, comme suit : 1° *Pas d'élection de domicile par l'huissier au temps de la saisie.* En effet il n'appert

pas qu'aucune telle élection ait été faite, mais, si on en appelle à la pratique de cette cour, on voit qu'il a été invariablement jugé qu'elle n'était pas nécessaire. Il n'en est pas ici comme en France, où chaque huissier agit de son chef en exécutant les saisies. Ici, le shérif est l'officier, et son bureau est le domicile élu pour toutes les parties, et le saisi ne peut ignorer où aller faire le paiement, s'il veut le faire, et c'est là la raison d'une élection de domicile, on l'a toujours ainsi décidé ici, et aussi à Québec, ainsi que j'en suis informé par mon savant confrère (VANFELSON), et quand il n'en aurait pas été ainsi, je serais prêt à le juger de cette manière à présent. La cour, en conséquence, n'a point de doute que ce moyen n'est pas soutenable. 2° *Pas de commendement de payer.* Il n'est pas douteux qu'en France c'était une nullité qui viciait la saisie réelle. Ici, nous sommes sous l'effet du changement introduit par l'ordonnance de 1785, qui prescrit la saisie des meubles et des immeubles par le même exécutoire ; c'est donc évidemment une seule et même exécution, et, quoique dans ce district, on les ait séparées, ce n'est que comme plus grande facilité. Ici, le procès-verbal contre les meubles du Demandeur actuel, constate la demande de payer, qui est suffisante, sans qu'il soit nécessaire d'en faire une seconde. 3° *Absence des recors ou témoins à la saisie.* Il n'est pas besoin de s'entendre sur cette objection, vu qu'on a déjà plusieurs fois déclaré que tels recors ou témoins n'étaient pas nécessaires. L'ordonnance de 1667 les requiérait pour la saisie des meubles, il est vrai, mais, lors de son enregistrement en ce pays, cette partie en fut retranchée. En France, cette omission emportait la peine de nullité, parce que l'édit de contrôle, qui n'a jamais été en force ici, exigeait la présence de recors. 4° *Le procès-verbal ne fait pas voir si la saisie a été faite avant ou après-midi.* Cette formalité n'a jamais été observée ici, et le manque de cette formalité n'était pas, non plus, une cause de nullité en France. Plusieurs causes de nullités, il faut le remarquer, n'ont jamais été prononcées par les lois, mais ont été introduites par le silence ou la jurisprudence des tribunaux, ou par l'ingénuité des procureurs qui les invoquaient en toute occasion.

En fait de pratique, j'adopterais l'autorité de Pothier, de préférence à toute autre, même à celle de M. Biret. Pigeau, en son premier volume, p. 700, note (a), dit : " on ne voit " aucune loi ni règlement qui oblige à exprimer l'avant ou " l'après-midi dans la saisie réelle." Mais, quand même cette cause de nullité aurait existé en France, une pratique contraire, en ce pays, a eu l'effet d'abroger la jurisprudence française. 5° *Le procès-verbal n'exprime pas le montant de la dette.* Le warrant et le procès-verbal doivent être pris ensemble, et cette objection, dans ce cas, se trouve dénuée de fonde-

ment. 6° *Pas d'élection de domicile du Demandeur.* Les observations sur la première objection s'appliquent à celle-ci. En France, l'élection de domicile n'avait lieu que lorsque le créancier saisissant ne résidait pas au même lieu que le débiteur, mais aucun texte spécifique ne faisait une nullité de cette omission. Pigeau, p. 701, note (a), dit: "aucune loi ne l'établit directement." Ce n'était pas une loi, mais une simple pratique des tribunanx. Trois ou quatre autres objections sont relatives aux annonces et publications de la vente ; le rapport du shérif, alléguant qu'il a procédé à la vente, après avoir duement fait les annonces et publications, est suffisant jusqu'à ce qu'il ait été mis de côté sur une contestation en forme. Mais il y a un autre moyen plus sérieux, et qui a occupé davantage l'attention de la cour, c'est que le procès-verbal ne fait pas voir que copie en a été signifiée au Défendeur. Le certificat de l'huissier porte qu'il en a signifié " une copie au Défendeur, *en la laissant sur la terre ;* " c'est là évidemment un rapport impropre, ou plutôt ce n'en est pas un, et c'est une omission d'une formalité essentielle,parce que le Défendeur devait être informé que sa propriété était saisie : mais, admettant même cette irrégularité, on ne voit pas que le Défendeur n'a pas reçu cette copie, et il ne le dit pas lui-même. Mais ici se présente une autre question. Il ne peut y avoir de doute que, sous le système français, toutes les formalités de la saisie pouvaient être mises en question jusqu'au *congé d'adjuger* ou *l'appointement* à décréter, ainsi que l'appelle Pothier: s'il était fait quelque chose de nature à annuler les procédés, le Défendeur devait en donner connaissance, et, à défaut par lui de le faire, et le *congé d'adjuger* prononcé, il était pour toujours forclos du droit de se prévaloir de telle nullité. On s'est demandé si nos lois, en simplifiant la procédure du décret, et dispensant de la formalité du *congé d'adjuger*, y avaient substitué quelque autre mode pour forclore le Défendeur du droit d'invoquer les nullités qui pourraient se rencontrer dans la saisie ? La cour est d'opinion que tel moyen existe, et qu'on trouve dans le statut une indication de procédés équivalant, pour cet effet, au congé d'adjuger. Par la 38e section de l'ordonnance de 1785, prescrivant la manière dont le shérif devra procéder sur les ventes d'immeubles, il est déclaré, que la vente par le shérif, " sans " autre formalité, aura la même force et effet que le décret " avait auparavant." Vient ensuite le statut de la 41e Geo. III, ch. VII, dont la 11e section porte " qu'aucune opposition à fin " d'annuler, etc., ne sera reçue par le shérif, à moins que ce ne " soit avant les jours qui précéderont immédiatement le jour " fixé pour la vente, etc., pourvu que le shérif ait fait savoir, " dans ses annonces de vente des immeubles, que telles oppo- " sitions ne seront pas reçues durant les quinze jours précé-

" dant la vente comme susdit." Ceci me semble établir, comme règle, qu'un temps est donné aux parties, qui ont à se plaindre d'irrégularités dans les procédés, pour produire et faire leurs oppos t.ons, et que dans la vue de les protéger, la loi a imposé au shérif l'obligation d'annoncer qu'après ce temps, aucune opposition ne serait reçue. Elles sont, par là, mises en demeure, et si elles laissent expirer ce terme, elles sont forcloses pour toujours. Rien ne peut être plus précis que l'expression du statut, et si ce n'était pas l'intention de la législature d'établir une règle de cette espèce, il n'en est établi aucune. Nous tenons donc que ce statut, joint à l'ordonnance de 1785, a établi un procédé équipollent au *congé d'adjuger*, et par lequel une partie ne peut venir réclamer après l'expiration du délai, et que l'informalité, en dernier lieu mentionnée, est couverte par le délai expiré, de même qu'elle l'aurait été en France par le *congé d'adjuger*. Il faut qu'il y ait un temps limité pour invoquer les irrégularités ; dire que la prescription seule peut donner un titre sur adjudication du shérif, serait ouvrir la porte à toutes sortes de difficultés. Mais la cour est disposée à aller plus loin, en disant que, dans la supposition où le statut ne serait pas assez positif, le Demandeur actuel, vu sa présence à la vente et adjudication de ses immeubles, devait se pourvoir en nullité de décret, et ne pas laisser prendre possession de ses biens, et attendre huit ou neuf ans pour venir ensuite, par une simple action pétitoire, sans égard à son expropriation, dont il ne fait pas plus mention que si elle n'eut jamais existé, demander la restitution de sa propriété. Si les principes de l'équité, et la convenance *(policy)* de maintenir les procédés des cours, autant qu'il est possible, doivent avoir du poids, la demande en cette cause ne peut certainement pas être reçue.

MONDELET, juge : Je concours à ce jugement dans toute son étendue ; mais si ces objections avaient été faites avant la vente, j'aurais été disposé à les accueillir, même celle qui regarde l'élection de domicile, considérant qu'elle est nécessaire, l'huissier, sur une saisie immobilière, n'ayant pas autorité de recevoir paiement.

SMITH, juge : J'aurais renvoyé la réponse du Demandeur sur un *demurrer*.

Le jugement est motivé comme suit : " The court, considering that the land and premises, in the Plaintiff's declaration described, were seized under a writ of execution, issued upon a judgment rendered in favor of John Boston, against the said Antoine Boyer, the now Plaintiff, and after having been advertised and published according to law, to be sold, as appears by the return of the late Honorable Roch de St. Ours, then sheriff, upon the said writ of execution, were, on

the 13th day of April, 1839, by the said sheriff, sold and adjudged to the said John Boston, in the manner alleged and set forth in the exception by the Defendants, in the said cause, plaided ; and, considering that the pretended informalities and nullities by the Plaintiff in his special answer in the said cause filed, assigned and alleged to have occurred in the said seizure, in so far as the same are shewn to exist, occurred in proceedings had and taken previously to the fifteen days next before the day fixed for the said sale and adjudication, and that the said Antoine Boyer, the now Plaintiff, notwithstanding the advertissements and publication of sale aforesaid, whereby he was duly notified and put *en demeure*, failed to make and file any opposition *à fin d'annuler*, at any time previous to the said fifteen days next before the day fixed for the said sale and adjudication, or any petition *en nullité de décret*, or to take any other proceeding for causing the said seizure, sale and adjudication to be annulled and set aside, by reason of the said pretended informalities and nullities, and that by reason thereof and by law, he cannot now set up and oppose the said pretented informalities and nullities, and have the benefit thereof in manner and form as he has sought to do by his said special answers, doth dismiss the said special answers ; and the court declaring, that by reason of the said seizure, and adjudication, the said Antoine Boyer, the now Plaintiff, was dispossessed of and lost his title, right and property, in and to the said land and premises, and that the said John Boston, became by virtue thereof, the owner and possessor of the said land and premises, doth maintain the said exception of the Defendants, and dismisses the action of the Plaintiff. (2 *D. T. B. C.*, p. 53.)

DRUMMOND et LORANGER, pour le Demandeur.

BETHUNE et DUNKIN, pour les Défendeurs.

SUCCESSION VACANTE.—CURATEUR.

COUR SUPÉRIEURE, Québec, 12 mars 1850.

Présents : BOWEN, Juge en Chef, et DUVAL, Juge.

TESSIER *vs.* TESSIER.

Jugé : Qu'un curateur à une succession vacante ne peut pas être poursuivi par un tiers auquel il aurait transporté sa créance contre telle succession; le curateur ne pouvant se poursuivre lui-même ou se faire poursuivre par son propre cessionnaire.

Le Défendeur avait été nommé curateur à la succession vacante du nommé Blais. Il était lui-même créancier de cette

succession ; ne pouvant se poursuivre lui-même, il céda sa créance au Demandeur, qui intenta contre lui,en sa qualité de curateur,une action pour recouvrer la créance cédée. Le Défendeur fit défaut.

Cette action fut déboutée, sur le principe, que la cession ayant eu lieu depuis la nomination du curateur, c'était de sa part se poursuivre lui-même ; que, dans ce cas, son seul remède était de renoncer à la curatelle, et de nommer un autre curateur. Ce jugement n'est pas motivé. (1) (2 *D. T. B. C.*, p. 63.)

TESSIER, pour le Demandeur.

APPEL.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 17 janvier 1852.

Before ROLLAND, PANET and AYLWIN, Justices.

WURTELE, Appellant, and THE BISHOP OF QUEBEC, Respondent.

Jugé : Qu'un jugement de la Cour Supérieure, refusant l'émanation d'un writ de *mandamus*, sur requête exposant que l'évêque de Québec a refusé de lire le service funèbre sur le corps d'un défunt, est un jugement final, dont il y a appel, aux termes de la 12e Vic., ch. XLI, s. 20. (2)

The Appellant had presented a petition in the court below, complaining that the Right Reverend G. J. Mountain, Lord Bishop of Quebec, had refused, though duly requested so to do, to read the funeral service over the body of his deceased infant child, and prayed that a writ of *mandamus* should issue. The prayer of the petition was rejected by the judgement rendered, on the 18th September, 1851,by BOWEN, Chief Justice,BACQUET and MEREDITH, Justices.

That judgement is as follows :

The court, having heard the Petitioner, Christian Wurtele, and the Right Reverend George Jehosaphat Mountain, Lord Bishop of the diocese of Quebec and Rector of the parish of Quebec in the same diocese, upon the petition of the said Christian Wurtele, in this cause filed, praying that a writ of *mandamus* do issue in the said cause, and having seen the affidavit of the said Christian Wurtele, in this cause filed, by which it appears, that the said Christian Wurtele, on the twenty-sixth day of July last past, notified and required the said George Jehosaphat Mountain, as such Rector of the said parish of Quebec, to open the parish church of the said parish, at the hour of eight of the

(1) 12 V., ch. XXXVIII, s. 36.

(2) V. la cause de *Wurtele*, requérant *mandamus*, supra p. 66.

clock in the forenoon, on Monday, the twenty-eighth day of the said month of July, or at such hour as the said George Jehosaphat Mountain might, at the time of the making of the said requisition, indicate, and there read, over the deceased infant child of him the said Christian Wurtele, the funeral service, as prescribed by the book of common prayer of the Church of England. And, considering that the said George Jehosaphat Mountain was not, and is not, bound to comply with the said request, on the part of the said Christian Wurtele. It is ordered, that the prayer of the said petition be, and the same is hereby dismissed.

The Petitioner carried this judgment into appeal; upon which, the Respondent moved that the appeal should be dismissed, on the ground that the judgment was not, by its nature, final and appealable.

On behalf of the Respondent, it was said that the judgment was not appealable; that it was a judgment rendered as upon a rule, the petition required by our statute being nothing but the motion made in similar cases in England; that the writ of *mandamus* was not issuable as a matter of right, but left to the discretion of the judges of the court applied to; that the Appellant had complained that the Respondent had refused to read the funeral service over the body of his infant child, and and had not shewn a legal obligation in the Respondent to do so; that the mode of burial was a matter purely of ecclesiastical cognizance, and not within the jurisdiction of civil courts; (1) that as to the plea to the petition, spoken of in the Prov. Stat: it meant what is called in England the return to the writ of *mandamus*, after it has issued; that this enactment of the statute was a mere blunder, a piece of unskilful machinery, notwithstanding which, the proceedings must necessarily continue to be regulated by English rules; that the Appellant having altogether failed to show, in the Respondent, the omission to fulfil a civil duty, the writ had been properly refused.

It was contended, on the behalf of the Appellant, that the judgment was made appealable by 12 Vict., ch. XLI, sec. 20; that the court below had decided the case upon its merits, and rendered a final judgment; that the Prov. Stat. had altogether changed the mode of obtaining the remedy by writ of *mandamus*, and that, by the 11th sec., the writ must issue, *de plano*, upon petition showing a *primâ facie* case; that the obligation to read the funeral service is a civil obligation (2); that the court below had taken the merits of the case into considera-

(1) 2 B & A., p. 806. *King* vs *Coleridge*; 1 B. & A., p. 122, *Ex parte* Blackmore.

(2) Répertoire, *verbo* **sépulture.**

tion, without plea and answer, and upon a motion decided the whole case; that a writ ought to have been granted, and the Respondent compelled to plead to the allegations contained in the petition; that the matter of civil obligation and duty spoken of, was a matter of proof to be hereafter established in various ways, as by the production of the letters patent appointing the Respondent; that, in England, there was no appeal in the case of a writ of *mandamus* being refused, but not so by the Pro. Statute; that there was in Canada a church temporalities law concerning the Church of England, imposing several civil obligations.

ROLLAND, Justice: The statute 12 Vict., ch. XLI, has altered the remedy given in England, and used up to the period of its being passed in Canada, by means of the prerogative writ of *mandamus*, by directing how the matter shall be proceeded with in all cases, as it is said, in a writ of *mandamus* will lie and might be legally issued in England. This must be considered as indicating cases in which no other remedy could be looked for; and the statute expressly provides, that every application shall be made by a declaration or petition (*requête libellée*) supported by affidavit, to the satisfaction of the court or judges to whom the application is made, setting forth the facts of the case whereupon it would be lawful for the said court or judges to issue the writ of *mandamus*, and it directs that the Defendant shall not be allowed to shew cause otherwise than by answering or pleading to such declaration or petition, etc., etc.

That there cannot be two interpretations given to the Statute, is evident.

Then, by the 20th clause, it is said that an appeal shall lie to the Court of Queen's Bench, from all final judgments in such matters. (1)

The application here appears to have been made in the form directed, and the regularity of the proceedings was the only question to be the subject of consideration. Yet, the court, on the first presentation of the petition, refused the allowance of the writ, and that upon grounds evidently touching the merits of the application; and now, on an appeal brought, a motion is made to dismiss the appeal on the ground that the judgment rendered is not appealable.

(1) La section 20 du ch. XLI, des Statuts du Canada de 1849, 12 Victoria, intitulé : "Acte pour définir le mode des procédures à adopter dans les cours de justice du Bas-Canada dans les matières relatives à la protection et à la régie des droits de corporation et aux writs de prérogative, et pour d'autres fins y mentionnées" décrétait : "qu'il pourra être interjeté appel à la Cour du Banc de la Reine siégeant en cour d'appel, de tout jugement final rendu par la Cour Supérieure, dans les cas auxquels il est pourvu par le présent acte, excepté dans les cas de *certiorari*.

Although, this court is, no doubt, to consider this objection when the case comes for judgment on the appeal, it was contended that the objection might be made, *in limine*, by a motion such as the present. On this, I had some doubts, not having before me the Ordinance of 1787, I thought that it might be regular, but I can see nothing in the Ordinance to justify it; otherwise it might be made on every appeal instituted before this court, a proceeding which cannot be admitted. If we were to grant the motion, we would thereby dispose of the merit of the appeal on motion

It is said that the judges of the Superior Court have set aside the law by refusing to comply with its injunctions, and here it is that I have an objection to inter into the merits of the application before the court below ; I am of opinion we cannot do so on motion. We would fall into the same error in which it is said the court below has fallen. All we could do in this summary mode of enquiry, would be to say whether or not the application was of that irregular nature that the judges were authorized in rejecting it, and so, to prevent enquiry into the case. But they have not rejected it on account of its irregularity. It was a case, where, to use the words of the law, a writ of *mandamus* might issue in England. The affidavit appears to contain the necessary statement of facts, nor was irregularity or incompetence the ground of dismissal. But the judges assumed that they had a right, as in England, to grant the writ, or to refuse it in their discretion, an idea which we cannot adopt, for it is contrary to the express directions of the law, which says, that the Defendant shall not be allowed to show cause otherwise than by answer and pleadings, and that the like proceedings shall be had on all such applications for a writ of *mandamus* as are provided, in the act, for the determination of other cases. A contrary interpretation nullifies the statute. But all we can say now, without determining the merits of the appeal (which we must avoid), is, that the judgment, final as it is, must be and is appealable. The motives or reasons assigned by the court below, we will only try or determine upon hearing the appeal. The only plausible argument, in my mind, was, that there was actually no case before the court in which the judgment could be appealed from, for that the case was not there introduced, because of the refusal of the judges to allow its introduction. But, without saying that the judges were in error, (which we may say hereafter) we are certainly not prepared to say that there is no remedy against such a decision, and if there is, the appeal is the only remedy, as the judgment is final. However guarded we are in expressing an opinion as to the error committed by the court below, it is to be regretted

that, from what we must say, our future decision may be somewhat anticipated. But the Respondent must attribute this to himself, by raising prematurely the question that we will have to decide on the merits of the appeal. The court below, in my opinion, could only reject the application for irregularity, which would not have been a final judgment. This they have not done, but have dismissed the application by refusing to grant the writ, and this cannot be otherwise viewed than as an appealable judgment, and the court is unanimous in that opinion.

AYLWIN, Justice : At the time of the argument, my impression was against the Appellant : I had not then read the 20th section of the Prov. Statute, 12 Vict., ch. XLI ; but this section is conclusive on the point. It gives a right of appeal, in cases of *mandamus*, from every final judgment. The judgment appealed from is unquestionably a final judgment. The Appellant has complained that the Lord Bishop of Quebec, has refused to read the funeral service over the dead body of his infant child, and alleged, and offered to prove, that there was a legal obligation on the part of the Lord Bishop to do so ; his application has been refused, and he has therefore never been heard upon the merits of his application. That judgment is final, and may be compared to a judgment dismissing an action upon demurrer.

Motion overruled. (2 *D. T. B. C.*, p. 65.)

STUART, A., and PRIMROSE, for Appellant.

BLACK, for Respondent.

EXECUTEUR TESTAMENTAIRE.—SEQUESTRE.

SUPERIOR COURT, Montreal, 13 janvier 1852.

Before DAY, SMITH and MONDELET, Justices.

MACKINTOSH et al., *vs.* DEASE.

Jugé : 1° Qu'un exécuteur testamentaire, dont les pouvoirs sont prolongés au delà de l'an et jour, qui est devenu insolvable, et qui dissipe les biens de la succession, peut-être déchu par la cour de l'exécution testamentaire et de l'administration des biens délaissés, et 2° que la cour, dans ce cas, n'a pas le pouvoir de nommer un séquestre.

Action by a minor, assisted by his tutor *ad hoc*, against an executor, to oust him from office, to account, &c., &c.

The declaration alleged that the late W. Mackintosh, in his lifetime of Lachine, departed this life in February, 1842, leaving three minor children, of whom Duncan Mackintosh, the Plaintiff, was one ; that, by his testament, he appointed Defendant, and one James Keith, executors to his will, together with the Plaintiff, when he should have attained the age of

" twenty-one years, " and did, thereby, declare his desire that " the powers of the executors should not cease or expire at the " end of one year and a day, as limited by law, but that the " same should continue and be vested in them as such executors, " until the entire execution and accomplishment of the said " last will and testament " ; that the testator, at the time of his decease, was possessed of real and personal estate of the value of £15, 000, the whole of which, after deduction made of certain legacies, he bequeathed to his two sons, William Mackintosh and Duncan Mackintosh, the Plaintiff, or the survivor of them when they should respectively attain the age of 21 years; that of the estate so bequeathed to his two sons, between £7000 and £8000 consisted in Hudson's Bay and Bank stock, which stock and the funds or securities to be purchased therewith, the said will directed " should be paid and transferred to the said " William and D. Mackintosh, respectively, when they should " respectively attain the age of 21 years, and that the interest, " accruing therefrom in the meantime, should be applied " towards their education and maintenance, respectively, until they should attain the said ages respectively " ; that Defendant alone accepted of the office of executor, Keith having renounced ; that Defendant had possessed himself of all the estate, real and personal, of the testator ; that William Mackintosh, one of the minors, died in 1842, and that the Defendant was afterwards appointed tutor to the two surviving minor children, and Donald Mackintosh, of Rivière-à-Delisle, sub-tutor ; that on the fifth day of November last, the Plaintiff, being still a minor, contracted marriage with Agnes C. Bonacina and, thereby, became emancipated, and the tutorship of the Defendant became and was thereupon determined ; that, at the time of the making of the will, Defendant was reputed to be a person of wealth, but that, for a long time past, he had been insolvent, affording no security for the fulfilment of his obligations as executor ; that he had failed to make an inventory of the estate of the testator, whereby the rights of the Plaintiffs, and other legatees, had been lost ; and, further, that he had appropriated to his own use, large sums of money belonging to the estate ;

Conclusion : 1° that Defendant be condemned to render an account, and, in default, to pay the sum of £15,000 ; 2° that he cause a true and faithful inventory of the estate to be made and registered ; 3° that he be ousted and divested of his office, and of and from all further administration of the estate ; and 4° that a sequestrator and receiver be appointed, in the place and stead of the Defendant, to administer the estate, until Plaintiff shall have attained the age of majority.

Pleas : 1° *défense au fonds en droit,* on the ground that it

is not alleged, in the declaration, that the marriage of the Plaintiff, a minor, was contracted by and with the consent and advice of his tutor, or of a *conseil de famille*, or of any person authorized for that purpose; that consequently said marriage is null, and Plaintiff was not emancipated, and the tutorship of Defendant thereby determined; and further, because, a sub-tutor existing by law, whose duty it is to assist the minor in case of difference with his tutor, no reason is given, in the declaration, why the sub-tutor is not joined in the present action, instead of John Norton, the tutor *ad hoc*.

By his 2nd and 3rd pleas, the Defendant set up substantially the same matter by way of exception.

Issue was joined on the *défense au fonds en droit*, and demurrers filed to the exceptions.

The whole of the Defendant's pleas were dismissed on hearing, and a motion to file additional pleas having been rejected, Plaintiff proceeded *ex parte*.

DAY, Justice: The Defendant's pleas having been disposed of, on demurrers, the chief question which remains is, whether the court can give a judgment depriving an executor of his office? the Defendant has obtained possession of all the property, real and personal, of the testator: as regards a certain portion of the property, shares in the Hudson's Bay Company and the Bank, a clause in the will vested it in Dease till the minors had attained the age of 21 years, in order that it might be invested for their advantage but, as regards the rest of the property, there is nothing to show that the Defendant's powers, under the will, were prolonged beyond the year and a day. This extension of power does not confer on the Defendant any equitable or legal estate in the stock; it does not make him a trustee, but merely continues him executor. Now, the Plaintiff married at 18, and the Defendant has fallen into an insolvent condition, and has made away with a large portion of the estate of the minor; the question then which comes up is this, whether it is competent to this court, notwithstanding the terms of the will, to deprive the Defendant of his control of the property? and, although some doubts were entertained on this point, at the time of the argument, the court is satisfied, on consideration, both by general reasoning, and from special authority, that it has this power. The office of executor is simply a *mandat*: the executor is the *mandataire* of the testator, and the only difference between him and the ordinary *mandataire* is, that, instead of rendering account to his principal directly, he renders it to his successor. Applying this, we think the court

has the power to afford relief. (1) As to that part of the conclusion, which asks that the Defendant be condemned to make an inventory, we cannot grant it, nor is there any mode by which it could be enforced; also, as to the appointment of a sequestrator, the court is against the Plaintiff: the minor having the right to take the property, the appointment of a sequestrator would be useless.

SMITH, Justice, concurred. The remedy is according to our laws. I would not, however, be understood to express an opinion that, on a question respecting the powers of an executor, appointed under the English form of will, the Custom of Paris is the proper authority to refer to.

The following is the judgment:

The court, doth adjudge and condemn the Defendant, within two months from the service upon him of this judgment, to make and render to the said D. Mackintosh, legatee under the last will and testament of the said W. Mackintosh, a true, faithful, and exact account, under oath, of all and every the estate and property, real and personal, goods, monies, securities, stocks, chattels and effects, which have come into his hands, possession, custody and power, as executor of the said last will and testament, and of his care and management thereof, and of all and every the debts, sums of money, rents, issues and profits of the said property, real and personal, moveable and immoveable, received by him, the said Defendant, at any time, during his said gestion and administration, and of all debts, claims and demands which have been and were due to the said late W. Mackintosh, at the time of his decease, and the assumption by the Defendant of his said trust of Executor aforesaid, or which have become due to the said estate and succession, and generally of the affairs and business which he the said Defendant was, in virtue of his said trust, invested with the management, and by law is accountable and responsible for; and that Defendant do accompany said account with all books of accounts, papers and vouchers in support thereof: and the court doth oust and divest Defendant of his office and trust of executor, and of and from all further administration of said estate and property; and, as to the conclusions by the said Plaintiffs in their said declaration taken, that a sequestrator and receiver be named and appointed, in the place and stead of Defendant, to administer said estates and property bequeathed and devised, as therein mentioned, until Duncan Mackintosh shall have attained the age of majority, the court, considering that it cannot, by law, accord or order the naming

(1) 4 Ferrière, *Grand Coutumier*, p. 281, n° 6; Brillon, *Dict. des Arrêts*, verbo *exécuteur*, p. 217, n° 11; N. Dénizart, *verbo* exécuteur testamentaire, sec. 2, n° 6; Dalloz, *verbo* exécuteur testamentaire, n°s 39, 40.

and appointment of such sequestrator and receiver, doth dismiss the said conclusion, and so much of the action and demand of the Plaintiffs as relates thereto; and doth also dismiss all and every the other conclusions by the Plaintiffs in their said declaration taken, and not hereinbefore adjudged upon. (2 *D. T. B. C.*, p. 71.)

DEVLIN, Attorney for Plaintiff.

GUGY, for Defendant.

PROCEDURE.—SAISIE-ARRET.—HUISSIER.—RESPONSABILITE.

CIRCUIT COURT, Québec, 29 novembre 1851.

Before DUVAL, Justice.

LAMPSON *vs.* BARRET.

Jugé : Que d'après les disposions de la 12 Vict., ch. XXXVIII, sec.79, un writ de saisie-arrêt, après jugement, peut être rapporté en vacance, si tel writ émane dans une cause appelable.

Qu'il est du devoir de l'huissier de délivrer tel writ, le ou avant le jour du rapport, soit au procureur ou à la partie qui le lui a remis, ou de l'enfiler au Bureau du Greffier de la Cour dans laquelle il est rapportable, quand même il n'en a pas été spécialement requis.

Qu'ayant reçu tel writ comme huissier, pour en faire la signification, il ne lui sera pas permis de soutenir qu'il n'y a pas de preuve qu'il soit huissier.

Que la preuve du montant dû par le Tiers-saisi au Défendeur, ainsi que de la saisie faite entre les mains du Tiers-saisi, et du paiement de tel montant à d'autres qu'au Demandeur, le jugement du Demandeur n'étant pas payé, est suffisante pour donner au Demandeur le droit de recouvrer des dommages jusqu'au montant dû par tel Tiers-saisi, sans qu'il soit besoin de preuve directe de l'insolvabilité du Défendeur.

The declaration complained that Defendant, being a bailiff, the Plaintiff, at Quebec, on the 31st December, 1850, retained and employed him as such, and he, Defendant, as such bailiff, for reward and fees, by law allowed him, to be paid him by Plaintiff, when requested, and which Plaintiff was always ready to pay, when so requested, received from him, Plaintiff, a certain writ of *saisie-arrêt* to be executed, by which writ Defendant, as such bailiff, was commanded to attach all the sums of money, &c., in the hands of John Sharples, garnishee, belonging to John Curtain, to the amount of £50 currency, to summon the said John Curtain and John Sharples, to appear in court on the 13th day of January, 1851, and to have then and there, before the said court, the said writ. That Defendant received said writ, and promised to serve and execute the same, and to return and have the same before said court on the said day according to the command of said

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writ, and, although it was his duty so to do, and although he did attach, under the said writ, the sum of £29, which the said Sharples then owed to the said Curtain, in the hands of the said Sharples, he, Defendant, did not return said writ on the said 13th January, 1851, but illegally retained the same in his own possession; by reason whereof, the sum attached was paid over by Sharples to Curtain, and Plaintiff was deprived of the benefit of the seizure to his damage of £29.

To this action Defendant pleaded: That Plaintiff caused the writ to be issued without the ministry of an attorney, and by reason thereof, and of the Plaintiff's ignorance of the practice of the court, said writ was not returned into court on the return day; that it never has been the duty of the bailiff to return such writ into court, but to the person charging him with the execution thereof, and that Plaintiff never demanded the same, although Defendant was always ready to deliver it to him; that when Defendant undertook to serve said writ, Plaintiff promised to call at the Defendant's residence for the said writ, and Defendant's return thereon, but neglected so to do; that Defendant undertook to serve said writ in consideration of certain fees which Plaintiff did not pay, and that Defendant was not therefore bound to return the writ previously to the payment of his lawful fees; that, on the return day of the said writ Plaintiff, knowing the same was not returned, by reason of his own neglect, afterwards, caused another writ to be issued, and, thereby, attached, in the hands of said John Sharples, the same sum of £50, and, thereby, discharged Defendant from all liability arising out of his supposed neglect.

ANDREWS, for Plaintiff: It was the Defendant's duty to return the writ into court, he is commanded by the writ itself to do so; that is the instrument from whence he derives his authority, and, if he acted at all under it, he was bound to yield obedience to it in all its particulars (1).

But, the Defendant undertook to make this return, and the law would presume such an undertaking, though not specifically proved, for the law implies a promise to do that which a party is legally bound to do. When the obligation is a legal one, the party who ought to discharge it is liable, although there be no previous request or subsequent promise. (2)

The sum demanded as damages has been seized, and afterwards paid over by the garnishee, to the injury of Plaintiff, who has thus, by Defendant's neglect, been deprived of the benefit of the attachment made under the writ, and suffered

(1) Stephen, on Pleading, p. 20. (6th American Ed.)

(2) 2 Starkie, on Evid. Part 1, p. 727; Stephen, on Pleading, p. 18.

damage to the extent of the amount seized by him. The law will presume damage where the Defendant has been guilty of a breach of duty imposed upon him by law; the damages suffered by Plaintiff may arise, either from his having been delayed in recovering his debt, or from his having lost it altogether, or from his being likely to lose it (1).

Where a party is entitled to a reward for the performance of his act, he is by law answerable for any degree of neglect on his part, the reward may be considered as an insurance for the due performance of what he has undertaken.

The bailiff is strictly no agent of the Plaintiff, but he is the officer of the court, for the execution of its process, and must perform that which the writ commands him, and, if he do not, he is liable to the party for the damage caused, by reason of his neglect, although he was not aware that it was his duty to return the writ. (2)

But, that the Defendant knew it was his duty to return the writ is evident, from his having offered so to do on a day subsequent to the return day, when the officer of the court, whose particular duty it is to receive the returns, would not then receive it, because the return day was past.

VANNOVOUS, for Defendant : Plaintiff's plaint rests upon the supposition that, had the Defendant discharged his duty perfectly, in respect of the writ, Plaintiff would have derived benefit from it. To establish satisfactorily that position, it is necessary to show that the writ was a legal process, and one that might have issued, carrying with it all the penal consequences of a disobedience to the mandate contained in it. If, on the contrary, such cannot be shewn, it is manifest to the least susceptible, that if no benefit were conferred upon the person at whose instance the writ was issued, by the issuing of it, he cannot possibly have sustained a loss : hence, it follows, that, if the writ, in this case was invalid, a right of action against Defendant never accrued to Plaintiff.

To render the position assumed by Defendant intelligible, I will advert to the recent Judicature Act, 12 Vict,ch. XXXVIII, by the provisions of which an extended jurisdiction has been given to the Circuit Court, and, more particularly, to the section of the act which settles the terms of the Circuit Court in the Quebec Circuit. The terms of the court are held periodically, on the six last days of every month (except August), where and when only the court is in session. The writ, in the

(1) 2 Starkie, on Evid., Part 1, pp. 299, 1014.

(2) 2 Starkie, on Evid., Part 1, p. 727 ; 14 East, 468, *Slackford et al.*, vs. *Austen* ; 3 Toullier, Brussels Edit., p. 109, *Note* 2, p. 110, *Note* 1 ; Ignorance de ce qu'on doit savoir, rend responsable ; 5 Paris Edit. *Note* (2) to No. 389.

present instance, was issued and bears date on the 3rd January, 1851, and required the attendance of the *tiers-saisi*, and the Defendant on the 13th January instant before *the court ;* the *tiers-saisi* to make his declaration upon oath, and the Defendant then and there to shew cause why the attachment should not be declared valid. The first question which claims attention is, whether there was a court in session on the 14th January, and if there was no court on that day, will the parties enjoined by the writ to do a given thing, be deemed contumacious for not yielding obedience to a writ which, upon the face of it, requires an act to be done before a court which was not in session on that day, and which act (if the premises be true) could not be accomplished. The Defendant submits that the *tiers-saisi* could not obey the writ, *and cannot have incurred any penalty for neglect to attend*, because, there being no court, he could make no legal declaration ; and in the absence of any provision of law empowering the administration of oaths, I contend that either the clerk of the court, *ex officio*, nor any other person had the power to administer an oath to the *tiers-saisi*, and if he did so, the oath would be illegal, and no penalty would attach if the matter sworn to were false. (1)

I would also urge that the Plaintiff, having failed to show that Curtain is unable to pay the debt due by him, cannot maintain his action without proof of actual damage. (2)

Judgment for Plaintiff. (2 *D. T. B. C.*, p. 77.)

ANDREWS and CAMPBELL, for Plaintiff.

STUART and VANNOVOUS, for Defendant.

CONTRAT DE MARIAGE.—ENREGISTREMENT.

COUR SUPÉRIEURE, Québec, 13 octobre 1851.

Présents : DUVAL et MEREDITH, Juges.

PANET, Demandeur, *vs.* LARUE, Défendeur, et PANET et LARUE, Opposants.

Jugé : Qu'un contrat de mariage, assignant une rente viagère à la femme, doit être enregistré, pour lui conserver son rang d'hypothèque.

Dans cette cause, les biens dépendant de la succession de feu Wilbrod Larue, avaient été vendus, et il s'agissait d'en distribuer le produit entre divers créanciers hypothécaires. Parmi

(1) 20 Law Journal Rep : (N. S.) M. C. 197, *Regina* vs. *Hallett*.

(2) 4 Meeson & Welsby, 145 ; 1 Meeson & Welsby, 709; 5 Term Rep., 37 ; 1 M. & Rob, 227.

eux, s'était présentée Louise Badelard Panet, veuve du dit Wilbrod Larue, qui réclamait, outre des arrérages, un capital de £1,200, pour assurer le paiement à l'avenir d'une rente et pension viagère, constituée en sa faveur par son contrat de mariage avec le dit Wilbrod Larue, en date du 24 mai 1841 dans les termes suivants : " Et en considération de l'amitié que " le futur époux porte à la future épouse, et pour lui assurer " une existence honnête, au cas qu'elle lui survive, il lui fait, " par ces présentes, donation entre-vifs, pure et simple, ce qui " est accepté par la future épouse, sous l'autorisation de ses " père et mère, d'une rente annuelle et viagère de la somme de " soixante-quinze livres courant, payable en deux termes égaux, " laquelle commencera du jour du décès du futur époux, et " s'éteindra au décès de la future épouse, et sera à prendre " généralement sur les biens du futur époux."

Dans le projet de distribution préparé par le protonotaire, la veuve Larue, n'était colloquée ni pour le capital de cette rente, ni pour ses arrérages, tandis que des créanciers hypothécaires postérieures à la date de son contrat de mariage, et entre autres Charles Larue, dont l'hypothèque (duement enregistrée) ne remontait qu'au 6 mars 1847, étaient mis en ordre de collocation.

En conséquence, la Veuve Larue, contesta ce projet de distribution, et la collocation du dit Charles Larue, alléguant que sa créance hypothécaire, datant du 6 mars 1847, était postérieure à la sienne, qui remontait au 24 mai 1841, date de son contrat de mariage. Elle alléguait aussi que ce contrat de mariage avait été insinué du vivant de son époux, le 12 octobre 1849, et enregistré le 17 octobre 1849.

La créance hypothécaire du dit Charles Larue remontait au 6 mars 1847 : elle résultait de l'hypothèque produite par l'acte de tutelle, duement enregistré, nommant Wilbrod Larue, tuteur à son frère, Charles Larue.

Deux questions furent soumises à la cour :

1. Le contrat de mariage du 24 mai 1841, portant la donation de cette rente viagère, ne devait-il pas être insinué, suivant la loi, dans les 4 mois de sa date ; et ce défaut d'insinuation ne pouvait-il pas être invoqué avec raison par Charles Larue, nonobstant l'insinuation tardive faite le 16 octobre 1849 ?

2. La Dame Larue n'avait-elle pas perdu son rang d'hypothèque, à l'égard du dit Charles Larue, en ne faisant enregistrer son contrat de mariage que le 17 octobre 1849 ?

Le conseil de la Dame Larue soutenait : 1. que l'insinuation faite du vivant du mari, le 17 octobre 1849, avait été faite à temps ; 2. que, d'ailleurs, cette rente viagère était un *gain de survie*, qui, à l'instar du douaire, n'était pas sujet à l'insinuation ; 3. qu'il n'était pas nécessaire, aux termes des ordon-

nances et statuts relatifs aux enregistrements, d'enregistrer le contrat de mariage, pour conserver à la femme ses avantages matrimoniaux, et notamment un avantage de cette nature ; il appuyait ces prétentions des autorités annotées au bas de la page. (1)

Le conseil de Charles Larue, soutenait: 1. que cet avantage était, dans les termes mêmes, une donation entre vifs, quoique le paiement ne dût être fait qu'après le décès du mari, et que, conséquemment, il était sujet à l'insinuation ; 2. que ce n'était qu'un simple droit d'hypothèque, constituée et établie conventionnellement, comme le serait le préciput conventionnel établi par le Code, dont la conservation et le rang dépendaient de l'enregistrement de l'acte qui l'avait constitué ; qu'évidemment, ces sortes d'hypothèques étaient de celles dont les ordonnances et les statuts exigent l'enregistrement. Il se fondait sur les autorités citées en note. (2)

Il soutenait que la décision citée de la Revue de législation, n'était pas applicable, en ce que, dans le cas cité, il s'agissait d'une réclamation pour *deniers dotaux*, et non d'un avantage assigné par le mari à la femme. Il était douteux, d'ailleurs, si la décision, sur laquelle on s'appuyait tant, était fondée en loi.

Le jugement qui suit porte que telle réclamation devait être enregistrée. La cour n'a jugé que la question d'enregistrement.

" La cour, considérant que la réclamation contenue en l'opposition de Louise Badelard Panet est fondée sur son contrat de mariage avec Wilbrod Larue du 24 mai 1841, et que ce contrat n'a été enregistré que le 17 octobre 1849 ; considérant que les réclamations des autres opposants, et notamment celle de Chs Larue, ont été enregistrées longtemps avant ; considérant que la réclamation de la dite Dame L. B. Panet est nulle et de nul effet, quant aux créanciers susdits, déboute la contestation de la dite Dame L. B. Panet." (2 *D. T. B. C.*, p. 83.)

TASCHEREAU, J. T., pour la Dame Larue.

BURROUGHS & TACHÉ, pour Charles Larue.

LELIÈVRE & ANGERS, Conseils.

(1) 3 Revue de jurisprudence, p. 478 ; L. C. Dénizart, *verbo* douaire, p. 169 ; 6 Pothier, *Des donations*, p. 473 ; l'ordonnance de 1731. (Cette ordonnance n'a pas été enregistrée, et n'a pas force de loi en Canada.) Guyot, Répertoire de jurisprudence, *verbo* gains nuptiaux, p. 704 ; idem, *verbo* insinuation, p. 278 ; 3 Merlin, Question de droit, *verbo* insinuation, pp. 656, 657.

(2) Rev. de jurisprudence, pp. 299, 301 ; Ordonnance de Moulins, et l'ordonnance de 1629, Guyot, Rép. de jurisprudence, *verbo* insinuation, pp. 275, 276, 279; 2 Bourjon. p. 127, ch. v, s. 3, n°s 9, 10, 11 ; Ricard, *Donations*, p. 259 : 6 Pothier, *Donations*, p. 482 ; Actes de notoriété, pp. 12, 13, 51, 207 ; Louet, *Douaire*, p. 277 ; 5 Journal des auditeurs, pp. 23, 24; 1 Argou, p. 291; 4 Vict., ch. xxx, sec. 4, 21, 23, 29, 39.

PROCEDURE.—DEFENSE EN FAIT.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 11 juillet 1851.

Present: ROLLAND, PANET and AYLWIN, Justices.

COPPS, Appellant, and COPPS, Respondent.

Jugé: Que sous la 12 Vic., ch. XXXVIII, sec. 85, il est nécessaire, dans une défense au fonds en fait, de nier expressément chacun des faits allégués en la déclaration du Demandeur, autrement tels faits seront pris pour admis. (1)

This was an action brought in the Circuit Court, at Quebec, by Joseph Copps, the Respondent, who alleged, in his declaration, that Appellant was indebted to him in the sum of £33, " for the balance due to him, for his services, from the 10th December, 1849, to the 29th July, 1850, as clerk and foreman of Defendant, at the rate of £6 10s. per month, which was the value of his services, and which Defendant promised to pay."

To this action Defendant pleaded, by peremptory exception, alleging payment of the Plaintiff's demand, and also, by *défense au fonds en fait*, denying generally all the facts alleged by Plaintiff, and, particularly, that " he (the Plaintiff) had performed any services of the value of £6 10s. per month or of any other value, and that he, the Defendant, did not undertake and promise in the manner and form alleged."

It was pretended, by Defendant, in the Circuit Court, that the evidence was insufficient, and that Plaintiff's action must, therefore, be dismissed; the court (DUVAL, Justice) was of opinion that the plea of payment was an admission of the demand, and judgment was, therefore, rendered against the Defendant for the full amount. On appeal to the Superior Court, the cause came before BOWEN, Chief Justice, and MEREDITH, Justice, who being divided in opinion, the judgment of the Circuit Court remained confirmed.

The cause was finally brought before the Court of Appeals, when, in July term, 1851, the court, without pronouncing upon the question of the divisibility of the *aveu judiciaire* contained in the plea of payment, upon which point the case had been decided in the other tribunals, confirmed the judgment of the Circuit Court (ROLLAND, Justice, dissenting) and assigned the following grounds for their judgment.

AYLWIN, Justice: Though the amount claimed, in this case, is small, the principles involved are of the highest importance. The action is brought by a lumberman against his employer for wages earned by Plaintiff, for bringing Defendant's raft from Upper Canada to Quebec.

(1) V. art. 144 C. P. C.

Defendant pleaded payment, by peremptory exception, and also filed a *défense au fonds en fait*, by which, after a general denial of the facts alleged in the declaration, it was averred that Plaintiff "performed no service for Defendant of the value of £6 10s. per month." The majority of the court give no opinion on the point whether a plea of payment admits the existence of the debt, in such a manner as to exonerate the Plaintiff from proving it in the usual manner. I should have thought that the well known principle *Qui excipit non fatetur*, left no room for difficulty on this head. But it is not necessary to enlarge upon this part of the case. The point here is as to the effect of the 12th Vic., ch. XXXVIII, sec. 85, on our system of pleading. That section enacts, "that, in any pleading, in any contested civil case, every allegation of fact, the truth of which the opposite party shall not expressly deny, or declare to be unknown to him, shall be held to be admitted by him; and the costs of proving any such allegation of fact, or any document proved in evidence, shall always be in the discretion of the court, so that the whole or any part of such costs may be awarded against a party denying or not admitting any fact or document, which, in the opinion of the court, he must have known to be true or genuine, whatever be the event of the case." This section was intended to remedy a great and growing evil. Forms altogether unknown to our law and system of pleading have been introduced here; and, among them, that most dangerous plea, the general issue, and whilst recent legislative enactments, in England, and rules of court in Upper Canada, have greatly mitigated the evil of the general issue, here, we are exposed to all its mischievous effects. In England, it is understood only to cover certain particular points, and is limited to these. In Upper Canada, it is equally restricted in its effects, so as to narrow the issue as much as possible, to avoid embarrassment to the Plaintiff, and to save costs. And I hold that the object of our legislature, in passing the 58th section of the Judicature Act, was to obtain this object. It is to be observed that the law says "every allegation of fact, the truth of which the opposite party does not expressly deny", evidently showing that the intention of the legislature was that there should be a pointed denegation of each specific fact stated in the declaration, which had a tendency to obtain for Plaintiff the judgment he demanded. Now, in this case, we have a *défense au fonds en fait*, in the usual printed form; the printed part is certainly not within the statute; and, as to the blank which Defendant's attorney has filled up in writing, it only denies that the Plaintiff ever rendered services to the Defendant of the value of £6 10s. per month. It does not deny that services were rendered,

or that they were rendered at the time, or at the place alleged, but simply denies their value as alleged. Now, a large portion of these services were rendered in Upper Canada; and to prove them, the party Respondent would have been obliged to sue out a *commission rogatoire* to Upper Canada. Had he done so, the Defendant might have said to him, I never denied the fact of the services having been rendered; you have gone into unnecessary evidence, and must pay the costs yourself. I deem the section of the Judicature Act I have quoted above, to be one of the most wholesome and beneficial provisions of the existing law. I see in it an obligation upon Defendants to plead *de bonne foi*, to file substantial defences instead of deceptive pleas, which only mislead and confuse the adversary and the judge. With the construction I put upon it, parties will go to law with their eyes open, and a full knowledge of what they will be expected to prove. With this construction, the question, does a plea of payment admit the debt? could never arise. And, I trust, the judges of courts of original jurisdiction will see the necessity of applying *the whole* of the section; that when parties shall have raised unnecessary and expensive issues, they will be mulcted in costs. If they do so, the result of this section will certainly be to improve and simplify the administration of justice. But, though I do not claim the gift of prophecy, I do not hesitate to say, that the time is not far distant when the Legislature will find it necessary to do here what has been done in other countries, to proscribe altogether the mischievous plea of general issue. (1)

ROLLAND, J.: I should indeed rejoice to see the day to which my learned brother alludes. But, in my opinion, so long as we have general demands, we must expect to have general defences. I differ from the majority of the court as to the interpretation of the statute 12 Vic., ch. XXXVIII, s. 85, or rather, as to what are *the facts* which must be "expressly denied." Now, we had before us, this term, a case in which the Plaintiff demanded £2000, for ten years' services as captain. The allegation of these services is not a single fact, but a vast number of facts, each year's or month's, or week's

(1) In the case of *St. John* vs. *Delisle*, which came before the Superior Court, at Montreal, the same point as that decided in *Copps* and *Copps* arose, when the following observations were made upon judgment being rendered:

DAY, J.: The question is, whether the general answers to the exception pleaded are available. As to the case of *Copps* and *Copps*, to which the attention of the court has been called, we do not agree with the judgment of the Court of Appeals; and, as the Chief Justice was absent when the judgment in the case alluded to was rendered, and one of the judges present dissented, we do not consider ourselves bound by the decision: we, therefore, consider the general denial in this case sufficient.

service being a separate fact. Would it be necessary for the Defendant to deny specifically these separate facts? Would he be required to say that, for the first week of the ten years no services were rendered, during the second week, the Plaintiff worked three days, and during the third week, the Plaintiff was drunk, etc., etc.? I can understand that, when the declaration is precise and specific, or when it is drawn, for instance, on a promissory note, if the Defendant does not deny his signature, it is held to be admitted. But, when the debt is based on a great variety of separate facts, I interpret the statute to mean, that a general denegation is quite sufficient. In the *défense au fonds en fait* filed in this case, " all, each, and every one of the facts alleged in the Plaintiff's declaration " are stated to be " wholly untrue and unfounded in fact and in law: " which I hold to be quite sufficient. The demand is general: and I cannot see how the defence can be otherwise than general. It will be borne in mind that, in the absence of the Chief Justice of this court, as I differ in opinion from my learned brethren on this point, this judgment will not have the effect of settling the jurisprudence.

PANET, J., concurred with Mr. Justice AYLWIN, and remarked, that this point could not be considered as finally settled, by reason of the dissent of Mr. Justice ROLLAND, and the absence of the chief justice. (2 *D. T. B. C.*, p. 105.)

HOLT and IRVINE, for Appellant.

ALLEYN, for Respondent.

PROCEDURE.—AMENDEMENT.

SUPERIOR COURT, Montreal, 27 octobre 1851.

THÉBERGE, the Elder, *vs.* PATTENAUDE.

Jugé: 1° Que la non-conformité de la copie avec l'original d'un writ de sommation est une nullité qui ne peut être amendée sans le consentement du Défendeur; et 2° qu'il n'est pas besoin de l'inscription de faux à l'encontre du rapport de l'huissier en pareil cas. (1)

In this cause, which came up on an appeal from the Circuit Court, the Plaintiff sued the Defendant, in an action of damages, for slander.

On the return of the action, Defendant appeared and filed an *exception à la forme*, on the ground " that there has been " no legal service upon him of the original writ of summons, " or of any other process or writ wherein the said Pierre Thé- " berge, *père*, is Plaintiff, but, that there has been served upon

(1) V. art. 117 C. P. C.

" him a copy of a certain writ, purporting to have been issued " at the instance of one Pierre Laberge, *père*, and annexed " thereto a copy of a declaration, in which Plaintiff is desi- " gnated as Pierre Théberge, *père*," &c. &c. ; wherefore, he " prays that the writ or process, and the service thereof made " may be declared illegal, and be set aside. "

Plaintiff moved to be allowed to serve a correct copy of the writ of summons on the Defendant, on payment of costs, which was granted by Mr. Justice McCORD.

Plaintiff, having caused a correct copy of the writ to be served on Defendant, afterwards moved that the exception *à la forme* be dismissed, which motion was rejected.

The proceedings being in this state, Plaintiff caused a demand of plea to be made on Defendant, who, the same day, notified Plaintiff to produce and file his answers to Defendant's exception *à la forme*.

Defendant not pleading within the delay, was foreclosed, and Plaintiff proceeded to proof *ex parte*.

On the 31st December, 1850, Mr. Justice McCORD rendered judgment, condemning Defendant to pay to Plaintiff the sum of £12 10s. as damages,

From this judgment Defendant appealed, on the ground chiefly that the court had no power to grant Plaintiff's motion to amend. by serving a copy of the writ of summons; that such service could not legalize the original service which was null; and that the court could not proceed to adjudicate *ex parte* on the merits of the case, till the *exception à la forme* had been disposed of.

On the 24th February, 1851, in the Superior court, present: SMITH, VANFELSON and MONDELET, Justices, the following judgment was rendered:

" Considering firstly, that the variance between the origi- " nal writ of summons and the copy thereof, which, previou- " sly to the amendment ordered by the court below, was and " is fatal, *une nullité*, the copy of a writ of summons, toge- " ther with the service of the said summons, being and consti- " tuting an essential and an integral part of the *exploit de som- " mation* ; considering, secondly, that the court below had and " hath no right to alter, *ex proprio motu*, or, upon the motion " of Plaintiff, unless assented to by Defendant, to permit any " such amendement as that which the said court has permitted ; " thirdly, that the said court below had not nor hath a right " to supply such nullity, by ordering the service upon De- " fendant of a copy of the original writ amended, different " from that which was, in the first instance, served upon De- " fendant, the said first copy being an integral part of the " *exploit de sommation* ; fourthly, that the exception *à la*

" *forme*, in the said cause filed, hath not been adjudicated " upon, and is still in its primary state, together with a de- " mand for an answer thereto; fifthly, that the court below " hath wrongfully refused to grant the motion of Plaintiff for " an adjudication upon the said *exception à la forme*, thereby " placing beyond a doubt the fact that the said *exception à la* " *forme*, is still unadjudicated upon; sixthly, that the gran- " ting Plaintiff leave to proceed *ex parte*, in the above men- " tioned state of the record, is a *nullité de procédure*; seven- " tly, that the court below had no evidence of any amendment " having been made, a pretended return upon the original writ " of summons, which a bailiff presumed to make, without any " authority for so doing, being an act which no court of justice " should sanction; eightly, that in consequence of such irregu- " larities and *nullités*, all the proceedings subsequent to the " filing of the *exception à la forme*, in the court below, are " vitiated, irregular, illegal and null, as well as the judgment " in the said court below, rendered the 31st December, 1850: " Wherefore, the said court doth declare and adjudge all such " proceedings irregular, illegal, null, and that, in respect the- " reof, and of said judgment, there has been a *mal jugé*, and " doth annul and set aside the same, and order that the court " below shall proceed, and cause the parties to proceed, as " and from the filing of the said *exception à la forme*." Mr. Justice SMITH dissenting.

The record being remitted to the court below, Plaintiff, on the 28th February, 1851, filed answers to the *exception à la forme*, denying the allegations therein made to be true, and alleging moreover that, supposing the variance to exist, the Defendant could not invoke this nullity by an *exception à la forme*.

At the *enquête* Defendant proceeded to examine the bailiff who served the writ, as also the prothonotaries and their clerks, as witnesses, to establish the facts alleged by him in his exception. To this evidence Plaintiff excepted, and afterwards moved to reject the depositions from the record, " attendu que le Défendeur n'avait pas le droit de faire " entendre des témoins pour contredire le rapport fait par " l'huissier de la signification de l'ordre, et qu'il ne pouvait " attaquer le rapport que par une inscription de faux."

The parties having been heard on this motion and on the merits, judgment was pronounced by Mr. Justice GUY on the 31st July, 1851, maintaining the *exception à la forme*, and declaring the writ of summons to be null and of no effect.

From this judgment Plaintiff appealed, on the grounds that the variance in the copy of the writ was a mere clerical error, which had not misled Defendant, seeing that he had actually

appeared: and, (which was the principal ground relied on) that the bailiff's return could only be impugned by an *inscription de faux.* (1)

Judgment was delivered on the 27th October, 1851. Present, Judges DAY, SMITH and VANFELSON confirming the judgment of the Inferior Court of the 31st July.

VANFELSON, Justice: The court are clearly of opinion that the judgment of the court below must be confirmed. In France, the duties of the *huissier* were, in respect to his return, very different from those of the bailiff in Canada: there, the *huissier* certified all the copies which he served, while here the bailiff merely serves such papers as are entrusted to him by others. He has nothing to do with certifying their authenticity, and the detection of any discrepancy between a copy and an original does not necessitate an *inscription de faux.*

DAY, Justice: I concur with my learned brother in the view he has taken of this case. Judgment of the court below confirmed. (2 *D. T. B. C.*, p. 110.)

CHERRIER and DORION, for Plaintiff.

CARTER and CARTER, for Defendant.

PRIVILEGE.—DEPENS.

COUR SUPÉRIEURE, Québec, 16 février 1852.

Présent: BOWEN, Juge en chef.

GARNEAU, Demanderesse, *vs.* FORTIN, Défendeur, et DIVERS, Opposants.

Jugé: Que le Demandeur dans une cause a droit d'être colloqué par privilège pour tous ses frais d'action, lorsque ces frais sont indispensables pour poursuivre la saisie et vente des immeubles d'un Défendeur. (2)

Les immeubles du Défendeur ayant été saisis et vendus, divers Opposants se présentèrent, réclamant d'être colloqués sur le produit d'iceux. Le procureur de la Demanderesse dans la cause, qui avait obtenu distraction de dépens, réclamait le montant qui lui était dû pour ses frais et dépens. Louis Couillard Dupuis était Opposant, et fondait sa réclamation sur un acte de vente en forme authentique, consenti par lui au dit

(1) Authorities cited by Plaintiff; Questions de Rodier, pp. 12 et 35; Carré, p. 362 et seq.

(2) V. art. 1995 C. C.

Défendeur le 13 avril 1848, dûment enregistré le 5 juillet de la même année.

Par l'ordre de distribution le procureur de la Demanderesse était colloqué pour *tout* le montant de ses frais et dépens. Cette collocation avait l'effet d'empêcher que Dupuis ne fût payé de tout le montant qui lui était dû, et il contesta l'ordre de distribution.

Ses moyens étaient comme suit : parce que la réclamation de Dupuis est fondée sur un acte de vente, consenti par Dupuis au Défendeur, le 13 avril 1848, enregistré le 5 juillet, même année ; parce que, en vertu du dit acte de vente, les immeubles du Défendeur sont hypothéqués en faveur de Dupuis, à compter du 5 juillet 1848, date de l'enregistrement, et que le droit d'hypothèque de la Demanderesse et de son procureur ne compte que du 10 décembre 1849.

JUGEMENT : La cour, considérant que la Demanderesse a droit d'être colloquée, par privilège, pour tous ses frais d'action, comme étant les frais indispensablement encourus pour poursuivre la saisie et vente des immeubles vendus en cette cause, et qu'il a été accordé distraction des dits frais en faveur de U. J. Tessier, procureur de la Demanderesse ; maintient la contestation de la collocation du dit U. J. Tessier, à l'exception de cette partie de la dite collocation qui a rapport à la partie des dits frais privilégiés susmentionnés. (2 *D. T. B. C.*, p. 115 et 14 *D. T. B. C.*, p, 146.)

GAUTHIER & LEMIEUX, pour L. C. Dupuis.

TESSIER, U. J., pour la Demanderesse.

GARDIEN JUDICIAIRE.

QUEEN'S BENCH, APPEAL SIDE, District of Quebec.

Before SIR JAMES STUART, Baronet, Chief Justice, and ROLLAND, PANET and AYLWIN, Justices.

DINNING (Plaintiff in the court below), Appellant, and JEFFERY (Defendant in the court below), Respondent.

Jugé : Qu'un gardien d'effets saisis au moyen d'un *writ* de revendication adressé au shérif, a son action aussi bien contre la partie qui a fait émaner ce writ que contre le shérif, pour le recouvrement de ses dépenses encourues comme gardien pour la conservation des dits effets. (1)

Jugement de la Cour Supérieure de Québec, infirmé.

Plaintiff's declaration alleged, that, on the 19th May, 1849, a writ of revendication was issued out of the Court of Queen's

(1) V. art. 847 et 868 C. P. C.

Bench for the district of Quebec, at the suit of Defendant, against John Shaw and Richard Jeffery, which writ was addressed to the sheriff of said district, who, in virtue thereof, seized and revendicated certain goods and chattels, then being in the hands and possession of said John Shaw and Richard Jeffery, and by Plaintiff in that cause alleged to be his. That present Plaintiff, Dinning, was, on the 21st May following, duly appointed guardian of said goods and chattels, and accepted the charge; and that the same continued to be and remain in the charge and custody of him, Plaintiff, as such guardian, until the 25th April, 1850, when they were delivered over to said John Shaw and Richard Jeffery in virtue of an interlocutory judgment of the Superior Court. That it became necessary for the guardianship and safe-keeping of these goods and chattels, to expend large sums of money in and about the guardianship and safe keeping thereof; and that in fact, Plaintiff had paid therefor the sum of £250 currency, which sum was still due and owing to him; and that Defendant, being the party Plaintiff and actor in the revendication suit, was liable to pay Dinning that sum.

The declaration concluded by praying that Defendant be condemned to pay Plaintiff the said sum of £250.

Defendant demurred to the declaration, as being insufficient in law: 1° because it was not alleged, nor did it appear, that any contract whatever had intervened, or was entered into, between Plaintiff and Defendant; 2° because it was not alleged, nor did it appear, that Plaintiff, if, at any time, he was appointed guardian of the goods and chattels in question, was so appointed at the request or with the consent or knowledge of Defendant; 3° because it was not alleged, nor did it appear, that Plaintiff, if he did, at any time, expend any sums of money in and about the guardianship of said goods and chattels, did so expend the same, at the request or with the knowledge or consent of Defendant.

In support of the count, Plaintiff referred to Pothier, *Proc. civile*, 182, 183, and 2d Jousse, *Com. civ.*, p. 585, tit. XXXIII, art. 10, s. 2.

Le jugement de la Cour Supérieure, rendu à Québec, le 17 décembre 1853, BOWEN, J. en C., et DUVAL, J., est en ces termes:

JUDGMENT: The court, considering that it is alleged that Plaintiff was named guardian of divers goods, chattels and effects seized by the sheriff of this district, in virtue of a writ of revendication issued at the suit of James Jeffery, the Defendant in this cause, against John Shaw and Richard Jeffery, and that there is due and owing to the said Plaintiff, Dinning, as such guardian, a sum of £250 currency, for the custody and safe-keeping of the same, while under seizure, in

virtue of the aforesaid writ of revendication, for the recovery of which sum this action is brought; and considering that said Defendant is responsible to the sheriff of the district to whom said writ was addressed, as well for the payment of the fees allowed said sheriff, as for payment and reimbursement of all expenses and disbursements incurred by said sheriff in the execution of the said writ; and that, by reason thereof, Defendant is not bound to pay to Plaintiff, the amount by him claimed as such guardian, doth maintain the demurrer in this cause filed by Defendant, and doth declare that the allegations set forth in said declaration, and the matters and things therein contained, in manner and form as the same are therein stated, are not sufficient in law to entitle Plaintiff to have or maintain his action against said Defendant, for the recovery of the sum of money alleged to be due and owing by Defendant to Plaintiff, and in consequence doth dismiss the said Plaintiff's declaration.

IRVINE, for Appellant: By the law of France, the *gardien* has a right of action against both the *huissier* and the *saisissant*. (1) The *gardien* can claim from the *saisissant* the necessary funds for the safe-keeping and custody of the effects seized. (2). By our Provincial Statute, (3) the sheriff could not refuse to accept a guardian, and, having accepted him, he is thereby exonerated from responsibility. It is only in the case of seizures of rafts, that the sheriff can claim monies for the custody thereof from the party *saisissant*. (4) It is not necessary that a *gardien* should by authorized in the first instance, to make disbursements, by the court or by a judge. If they become indispensably necessary, he should make them, and will be entitled to recover the same, if he can justify the expenditure. (5) Now this could only be done by means of an *enquête*, of which the Appellant has been deprived by the judgment of the court below.

POPE, for Respondent: A *gardien* has no right of action against the *saisissant*, uuless he has been authorized *en justice* to incur the disbursements which he seeks to recover. The authority cited by the Appellant from Jousse, establishes this proposition, for it reads thus: " Quand il y a des frais de " nourriture ou autres A AVANCER, pour la garde et entretien

(1) Il a action, pour en être payé, contre l'huissier qui l'a établi, et contre le saisissant à la requête de qui il est établi. Poth., *Prov. cir.*, pp. 182, 183.

(2) 2 Jousse, *Com. Ord.* 1667, tit. XXXIII, art. 10, s. 2.

(3) 6 Wm. IV, ch. xv, sec. 9.

(4) *Ibid*, sec. 23.

(5) Serpillon, *Code C*, p. 299.

" des effets saisis, le gardien peut demander au saisissant qu'il " lui soit fourni des deniers à cet effet, sinon, il peut demander " à être déchargé de la garde." The ordinance of 1667, tit. XIX, art. 12, declares that: " Les réparations et autres " impenses nécessaires aux lieux séquestrés, NE SERONT FAITES " QUE PAR AUTORITÉ DE JUSTICE, les parties duement appelées, " autrement elles tomberont en pure perte à ceux qui les " auront fait faire." (1) The principle established in relation to the *séquestres* applies equally to *gardiens*. (2) That *gardiens* should be duly authorized before they can institute actions, has been already decided. (3) The Appellant's declaration does not shew whether he was in law a *gardien* or a *dépositaire*. The former being offered by the *saisi*, his office is gratuitous. (4) The latter is appointed by the *huissier*, at the instance of the *saisissant*. No salary is due to the former. The office of *gardien* is a necessary one, and he is entitled to payment upon his bill being duly taxed, which has not been done in this case. The fact of an individual being either a *dépositaire* or a *gardien* makes most important differences, not only as regards payment, but also concerning the liabilities of the *saisissant* or *saisi* and yet the declaration is silent as to the party by whom the Appellant was appointed. The first authority, cited by the Appellant, has no application to the present case, or, if it does apply, it is adverse to him. (5) In that it admits the responsibility of the *saisissant* or *saisi* to the *huissier*, according as either may have appointed the *gardien*. It merely relates to the salary or pay of a *gardien*, whereas the Appellant's action is for neither, but for disbursements made. If it is applicable, then the bill should have been taxed previously. Had the Appellant been appointed guardian at the instance of the Respondent, the position of the latter might have been different from what it is, for, in that case, a contract would have been formed between the *saisissant*, the *saisi* and the *gardien*, in respect of which certain liabilities would have attached to the former. As the claim is for disbursements, it is fairly to be presumed that the Appellant was a *gardien volontaire* or *dépositaire*, and, in such case, the contract is solely between

(1) 1 Jousse, *loc. cit.*

(2) 1 Jousse, *Com. Ord.*, tit. XIX, art. 15, sec. 4.

(3) Rép. de Jurisp. *verbo* gardien, p. 126.

(4) Poth., *Proc. civ.*, part. 4, ch. II, art. 5, s. 1.

(5) Le gardien doit faire taxer ses salaires par le juge, il a action pour en être payé, etc, (*ante*. note 2) l'huissier en doit être acquitté par le saisissant ou par la partie saisie.

him and the party who appointed him, namely, the *saisi*. Had the latter obtained *main levée* of the seizure, he could have had no action against the *saisissant* for an account of the effects seized, nor for their production, he would have had his action solely against the *dépositaire*, whom he had himself chosen, (1) as the contract was solely between them, and if it was, how could the *dépositaire* claim payment from the *saisissant* who had never any thing to do with him ? How render the latter responsible for the payment of disbursements to an utter stranger, when he is not even liable to the *saisi*, whose effects have been saized ? The Provincial Statute, cited on the other side, is in favor of the Respondent, for it invests the sheriff with the liabilities of *gardiens* as they obtained in this country before 1759. (2) The 22nd section of that statute empowers the sheriff to exact a bond of indemnity before proceeding on a writ of revendication to attach rafts and timber. In this case several rafts and a large quantity of timber were alleged to have been seized. It is therefore evident that the sheriff alone was the party to whom the Respondent is liable. The 23rd section expressly introduces the system pursued under the ordinance of 1667, for it enacts that the sheriff shall be authorized to demand and receive, in advance, from the Plaintiff, such sum as may by any one of the judges, be deemed sufficient for the safe-keeping of the raft or timber, to be seized under a writ of revendication. *Similar* pretensions to those of the Respondent were maintained in a case of some importance. (3) Had the sheriff sued

(1) Poth., *Cont. de dépot*, n° 195.

(2) 6 Wm. IV, ch. xv, sec. 9.

(3) Tout dépositaire est responsable de la perte de la chose qui lui est confiée, arrivée par accident ou par force, si cette perte est occasionnée par une négligence, dont par la nature de son contrat, il est responsable, et, comme principe général, on peut dire que tout officier public est responsable de ses employés et serviteurs. Par le droit commun du Canada l'huissier n'est que l'officier saisissant ; c'était le gardien qui était nommé par l'huissier qui avait la charge des choses saisies, et l'huissier n'en était pas responsable s'il avait nommé comme gardien une personne réputée solvable. La loi à cet égard est considérablement changée, tous les brefs sont adressés au shérif, et il est décrété, par l'ordonnance 27 George III, ch. IV, § 11, que, si, sur une saisie-arrêt, le cautionnement n'est pas fourni, les effets resteront saisis et sous la garde du shérif, de sorte que le shérif est dépositaire, et officier saisissant, gardien aussi bien que huissier. Le gardien est responsable de la faute légère, et, conséquemment, le shérif, s'il est maintenant gardien, doit être responsable de la même manière, car il y a la même raison de le rendre responsable, et, peut-être plus, puisque le demandeur maintenant n'a pas le choix de son huissier ou gardien, comme il l'avait autrefois. Si l'on ne considère pas le shérif comme un gardien, mais si on le considère comme *séquestre*, il est également responsable de la faute légère. Pothier, considère le contrat, dans l'un ou l'autre cas, plutôt comme un contrat de louage, vu que ce n'est pas un contrat gratuit. Le shérif peut employer autant de personnes qu'il est nécessaire

the Respondent, it would have been no answer in law that he had already paid the *gardien*, since such sum clearly formed part of the sheriff's assets, and could have been claimed as such had he become a bankrupt, nor in the action in the court below could the Respondent make the sheriff a party to the suit. The authorities, on the other side, merely say, that: " le gardien a pour ses *salaires* une action contre le saisissant " et contre l'huissier même qui l'a établi;" but the distinction between the cases is too apparent not to shew that they are inapplicable in the cause before the court, for it supposes the case of a *gardien*, who must be appointed by the *huissier*, at the instance of the *saisissant*, in which case a contract would have been called into existence; whereas the present action is for disbursements made by a *dépositaire* offered by the *saisi*, no contract having been made in which the Respondent intervened.

SIR JAMES STUART, Bart., C. J.: The question in this cause is, whether a guardian to a seizure can bring his action directly against the Plaintiff, who has caused the seizure to be issued, and for whose benefit the guardianship has taken place, to be paid his salary and disbursements as such guardian. We are of opinion that the declaration shows a sufficient cause of action, and that the Plaintiff's action ought not to have been dismissed upon a demurrer. The court below has held, that the guardian has no action against the party who had taken the seizure, and could only bring his action against the sheriff who had constituted him guardian. We hold that the guardian had his recourse against both, and our opinion is based upon an authority to be found in *Nouveau Dénizart*, verbo *gardien*, where it is stated that such an action may be brought against the party or against his *huissier* represented here by the sheriff. In consequence we reverse the judgment of the court below, and send back the parties to proceed further before the said court.

The judgment in appeal is as follows: The Court of Queen's Bench, considering that a legal cause of action by the Appellant against the Respondent, is set forth and contained in the first count of the declaration of the Appellant in this cause, in the court below, and that the demurrer or *défense au fonds en droit*, of the Respondent to the said first count, has been erroneously by the court below, maintained, and thereupon, the action of the Appellant erroneously dismissed, as respects

pour garder la propriété, et il peut exiger du Demandeur une avance de deniers pour cette fin, et, en cas de refus, être déchargé de la garde des effets. Si le shérif ne représente pas les effets saisis, il doit être condamné à en payer la valeur, à dire *d'experts*. (*McClure* vs. *Shepherd*, C. B. R., Québec, 20 octobre 1813, 1 *R. J. R. Q.*, p. 151.)

the said first count. It is, by the said court, now here, adjudged, that the judgment appealed from, namely, the judgment of the court below in this cause rendered, on the seventeenth day of December, one thousand eight hundred and fifty-one, be and the same is hereby reversed, annulled and made void, and the said court, now here, proceeding to render such judgment in the premises as by the said court below ought to have been rendered. It is, further adjudged that the said demurrer, or *défense au fonds en droit* of Respondent, in this cause, filed in the court below, be and the same is hereby overruled: and that such other and further proceedings be had, in this cause in the court below, as to law and justice, may appertain. (2 *D. T. B. C.*, p. 118 et 360.)

HOLT and IRVINE, for Appellant.

POPE, for Respondent.

SAISIE-EXECUTION.

COUR SUPÉRIEURE, Québec, 16 décembre 1851.

Présents: BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

LEE, Demandeur, *vs.* LAMPSON, Défendeur, et DIVERS Opposants.

Jugé: **Que dans la saisie-exécution de meubles, le commandement de payer n'est pas nécessaire. (1)**

Les meubles du Défendeur furent d'abord saisis par le Demandeur. Le Demandeur ayant fait défaut de procéder sur sa saisie-exécution, Renaud et al., créanciers du Défendeur, qui s'étaient portés Opposants dans la cause, se firent substituer au Demandeur pour procéder à la vente des meubles saisis. En effet, ils firent émaner un writ de *venditioni exponas*, en vertu duquel ils procédèrent à faire vendre les meubles du Défendeur, lorsque celui-ci fila une *opposition à fin d'annuler*, alléguant que le jugement interlocutoire par lequel les Opposants, Renaud et al., s'étaient fait substituer, ne lui avait pas été signifié, et qu'eux, les opposants ne lui avaient pas fait ou fait faire de commandement de payer.

BOWEN, Juge en Chef: Les formalités voulues par l'ordonnance de 1667, sur la saisie-exécution de meubles ont été abrogées par l'Ordonnance de la 25e Geo. III, ch. II, qui règle les formalités que l'on doit observer sur l'exécution d'une saisie dirigée contre les meubles d'un Défendeur; le commandement

(1) V. art. 560 C. P. C.

de payer, au reste, n'est pas une des formalités voulues par l'Ordonnance de 1667, qui a établi toutes les formalités nécessaires pour cette saisie : l'ordonnance de 1539, exigeait *trois* jours entre le commandement et la saisie-exécution ; mais sa disposition est tombée en désuétude. (1)

La question de savoir si ce commandement était nécessaire s'est présentée à plusieurs reprises devant les cours de justice en ce pays, et il a toujours été jugé que cette formalité n'était pas nécessaire. (2)

L'opposition est donc déboutée avec dépens. (2 *D. T. B. C.*, p. 148.)

STUART et VANNOVOUS, pour Lampson.

AHERN, pour RENAUD et al.

TRANSPORT.—SIGNIFICATION.—PROCEDURE.

SUPERIOR COURT, Montréal, 30 décembre 1851.

Before DAY, SMITH and MONDELET, Justices.

ST. JOHN *vs.* DELISLE et al.

Jugé : 1° Que le certificat de l'huissier n'est pas une preuve authentique de la signification d'un transport fait devant notaires.

2° Qu'une réponse générale à un plaidoyer est suffisante pour obliger le Défendeur à la preuve des allégués de tel plaidoyer.

Action to recover £72 11s. 3d., balance of a notarial obligation for £1000, consented by Defendant Delisle, as principal, and the other Defendants as sureties, in favor of the *Montreal Provident and Savings Bank*, and by the bank assigned to Plaintiff, by deed executed before notaries, the 15th December, 1848.

Defendants pleaded :

1. That the pretended transfer to Plaintiff from the bank

(1) 1 Pigeau, 607. Avant de saisir, il est d'usage de faire un commandement au débiteur, pour qu'il paye et évite l'éclat fâcheux des contraintes.

On ne voit aucune loi qui exige cet acte ; il paraît qu'il était pratiqué avant l'ordonnance de 1539, puisque cette loi le suppose usité, et prescrit de le faire à personne ou domicile. L'ordonnance de 1667, qui a établi toutes les formalités nécessaires pour cette saisie, ne parle nullement de commandement.

L'ordonnance de 1539, exige trois jours entre le commandement et la saisie-exécution ; mais sa disposition est tombée en désuétude et avec raison : un débiteur de mauvaise volonté, ou qui serait hors d'état de payer, pourrait facilement détourner ses effets. A Paris et dans nombre d'endroits, on pense que l'on peut saisir dès le lendemain mais non auparavant, M. Jousse, sur l'article 3 du titre XXXIII de l'ordonnance de 1667, estime que le commandement peut être fait par le procès-verbal même de saisie, et qu'il n'est besoin par conséquent d'aucun intervalle. . . . . .

(2) N° 5 de 1808, *Volant* vs. *Drapeau* ; N° 384 de 1812, *Pozer* vs. *L'Espérance* ; N° 604 de 1818, *Robinson* vs. *Wilson* ; *Couturier* et *Lacroix*, en appel.

was only signified to Defendant Delisle, on 21st December, 1848, at twelve minutes before noon. That, on the 20th December, W. H. Coffin transferred to Delisle £72 15s. 2d. part of a larger sum deposited by the *cédant* in the Savings Bank; that this transfer was signified to the bank at a quarter past nine o'clock A. M., on the twenty-first December, by Wm. MOORE, one of the bailiffs of the Court of Queen's Bench for the District of Montreal, by delivery of a copy thereof to Charles Freeland, actuary of the Bank, at the office of the bank, and that, thereby, the debt due by Delisle to the bank was compensated and extinguished.

2. That the bank had no power to make the transfer to Plaintiff, inasmuch as the bank had neglected to fulfil the formalities required by the 4 and 5 Vict., ch. XXXII, providing for the establishment of savings banks, and had therefore no legal existence.

The second plea was demurred to and dismissed.

Defendants proved the signification to Mr. Delisle, of the transfer to Plaintiff, at the time alleged in their plea, by two witnesses who were present in Mr. Delisle's office, and noted the time of the signification and delivery of the copy by the notary. The copy of transfer, filed by Defendants, had endorsed on it the certificate of one William Moore, as one of the baillifs of the Court of Queen's Bench for the district of Montreal, setting forth a signification of the transfer in the manner and at the time alleged in Defendant's plea. It appeared also, that Mr. Coffin was a depositor in the bank, at the time of the transfer to Mr. Delisle, to the amount of £216, and that the bank had been in the habit of granting to depositors transfers against debtors of the bank, to the extent of ninety per cent. on the amounts deposited.

DAY, Justice: The attention of the counsel in this case was directed, by the court, to the question as to the sufficiency of a bailiff's certificate, to establish the signification of a transfer before notaries; as also to the question as to how far the signification is to be taken as admitted by the pleadings in the cause. On the first point, the court has seen no ground for changing the opinion expressed at the time the case was submitted to the counsel on this point. We think the bailiff's return is not to be taken as authentic. As to the other point, the court is not disposed, for the present, to adopt the judgment rendered by the Court of Appeals in the case of *Copps* vs. *Copps*, (1) although, as a general rule, I hold that this court is bound to yield implicit obedience to judgments rendered in the Court of Appeals, yet cases may arise in which it

(1) *Supra*, p. 105.

may be our duty to pause before doing so. By the eighty-fifth clause of the Judicature Act, it is enacted, " that every allegation of fact, the truth of which the opposite party shall not expressly deny or declare to be unknown to him, shall be held to be admitted by him." It is known that the opinion of the court on this section of the law has been expressed to the effect that, when the truth of all the allegations of a pleading is denied, this is equivalent to the express denial referred to in the act ; that by denying *all* the allegations unequivocally, each allegation is denied, and that it is not necsssary specially to negative each allegation (1). This opinion has been held by some of the judges in the other districts. The case of *Copps* vs. *Copps* came up from the Circuit Court at Quebec before the judges of the superior court, who were divided in opinion. It was then carried into appeal, three judges being present, Justices Rolland, Panet, and Aylwin, and an opinion, adverse to that expressed by this court, was rendered ; Mr. Justice Rolland dissenting. We have thus the opinion of six judges in the other courts on the one side, and that of the two judges in appeal on the other. Under these circumstances, the court feels justified is not adopting the decision in *Copps* and *Copps*, as governing the case, until the full majority of the Court of Appeals shall have expressed their opinion, when I shall feel it my duty to yield.

MONDELET, Justice, concurring in the judgment, expressed his opinion, that a single judgment of the Court of Appeals should not establish a rule for this court. (2 *D. T, B. C.*, p. 150.)

G. and A. ROBERTSON, for Plaintiff.

DUMAS and CHERRIER, for Defendant.

(1) *McGregor* vs. *MacKenzie et al* : Judgment 16th April, 1851. These were actions against the maker and endorser of two promissory notes ; plea : that the notes had been obtained fraudulently and without consideration, and had come into Plaintiff's hands through collusion with the payee ; to this plea, Plaintiff filed ; 1. a demurrer ; 2. general answer ; 3. replication. The parties having been heard on the demurrer, were ordered to proceed to proof, *avant faire droit*. At the *enquête*, Plaintiff established the material allegations of his declaration : The Defendants produced no evidence, but at the hearing contended that, inasmuch as the Plaintiff had not expressly denied the truth of the allegations contained in their plea, those allegations must, under the 85th section of the Judicature Act, be held to be admitted. The court (composed of Day, Vanfelson and Mondelet) rejected the Defendant's pretensions. Day, Justice, observing : the court finds no difficulty in the construction of the statute. The argument turns on the word " expressly," which the Defendants contend means " severally." We are against them on this view ; " expressly " means an express denial : it has no technical meaning apart from its ordinary colloquial one. The object of the legislature seems to have been to put an end to the doubts existing as to the effect of the *aveu judiciaire*, and whether it can be divided. We are of opinion the Plaintiff has sufficiently denied the allegations of the Defendant's plea. Judgment accordingly.

GRIFFIN, for Plaintiff ; MCIVER, for Defendants.

LOUAGE.—PRIVILEGE.—SAISIE-GAGERIE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 17 janvier 1852.

Before: ROLLAND, PANET and AYLWIN, Justices.

JONES (Plaintiff), Appellant, and ANDERSON (Defendant), Respondent, and CARR (Intervening Party).

Le Demandeur en cette cause avait poursuivi le Défendeur pour le loyer d'un quai, et saisi-gagé, sur le dit quai, une certaine quantité de briques à feu et de foyers; le Défendeur avait, entre autres choses, plaidé paiement; un tiers était intervenu dans la cause pour réclamer les dites briques et les dits foyers comme sa propriété; la Cour Inférieure avait été d'opinion, que le paiement était prouvé, avait débouté l'action du Demandeur, et maintenu l'intervention:

Jugé, en appel: 1. Qu'il n'y avait pas preuve du paiement; 2. que les briques et foyers, déposés sur le dit quai et saisis sur le Défendeur pour le loyer d'icelui, avaient été légalement saisis-gagés, pour garantir le paiement des loyers dus pour l'usage du dit quai; et que les briques et foyers étaient sujets par la loi au privilège du locateur, *super invectis et illatis*, comme marchandises, emmagasinées, déposées et mises en vente sur le quai, par l'agent et facteur du propriétaire, lequel en vertu du statut de la 10e et 11e Vic., chap. x, avait le pouvoir de mettre en gage les effets de son commettant: En conséquence, les jugements rendus en cour inférieure sont infirmés, l'action du Demandeur est maintenue, la saisie-gagerie déclarée bonne et valable, et l'intervention déboutée. (1)

This was an appeal instituted from a judgment, rendered in the Superior Court, sitting in the district of Quebec, on the 21st July, 1851, dismissing the Appellant's action.

The action, in the court below, was upon a lease made and executed before Hossack and another, public notaries, on the 12th of May, 1849, whereby Appellant leased, for the term of one year, to commence on the first day of May, and to terminate on the like day of May 1850, "*unto Patrick Anderson, merchant, of Quebec, and represented thereto by Thomas Anderson, his brother, thereunto present and accepting thereof, for and on behalf of said Patrick Anderson, as his attorney,*" a wharf and premises in the Lower Town, of the city de Quebec, the whole as occupied by the lessee, in consideration of the rent of £125 which the lessee, represented by Thomas Anderson), bound himself to pay to the lessor in and by quarterly payments of £31 5s. on the last day of each quarter during the term. The lease also provided that the premises should be furnished with effects, as customary, to guarantee the payment of this rent.

The declaration, proceeds to aver that Defendant was in possession of the premises, and that, on the last day of the quarter, ending on the 31st of January, 1850, the sum of £68 15s. was due and payable from Defendant to Plaintiff.

(1) V. art. 1619 et 1740 C. C.

Plaintiff obtained the usual process of saisie-gagerie, under which the sheriff seized and attached, upon the wharf in question, 28,096 fire bricks, and 2 hearth stones.

Upon the return of this process, there was filed a demand in intervention, in the name of "Thomas Carr, of New-Castle-upon-Tyne, in England, merchant," alleging that he was the lawful owner of the fire bricks and hearth stones which had been so seized, and praying that the same might be restored to him.

There was filed, on the part of the Defendant, Patrick Anderson, a plea of peremptory exception, in which, he alleges:

1. "That, subsequently to the passing of the lease, to wit, about the month of June (1850) at Quebec, John Jones did verbally lease the premises described in the declaration unto Thomas Anderson, for the year ending on the first day of May, 1850, and Thomas Anderson did thereupon enter in and upon the said wharf and premises, and did use and enjoy the same up to the first day of May (1850), and John Jones did receive, of and from Thomas Anderson, the rent of the said wharf for the year ending on the 1st day of May instant, and hath been wholly satisfied for the said rent by the said Thomas Anderson, to wit, by bricks delivered to the said John Jones and to his order."

2. "That the rent of the said wharf and premises, demanded in and by the Plaintiff's declaration, hath been well and truly paid, and satisfied to the said John Jones."

To this plea Plaintiff filed a demurrer, and, on the 9th of September, 1850, the court below pronounced the following judgment:

"The court, doth order, *avant faire droit*, that the parties do proceed to adduce proof of their several allegations upon the issue of fact raised upon the said pleadings."

To this interlocutory judgment an exception was filed by the Plaintiff, and it was one of the judgments now appealed from.

To the demand in intervention of Thomas Carr, Plaintiff pleaded: 1st the general issue; and 2ndly a plea of peremptory exception.

In the latter pleading, he alleged: "That the Defendant, Patrick Anderson, represented by Thomas Anderson, his brother and agent, had taken a lease from Plaintiff of said wharf for the purpose of having a place to deposit *Carr's fire bricks*, and where he could sell and dispose of the same; that by said lease said Thomas Anderson, as the agent of Patrick Anderson, had undertaken to have said wharf furnished with effects to guarantee the payment of the rent; that, until the

institution of Plaintiff's action, Patrick Anderson, through the instrumentality and agency of Thomas Anderson, his brother, had had the enjoyment of the premises, used them for the purpose above mentioned, and deposited thereon the several quantities of fire bricks seized at the instance of Plaintiff, to guarantee the payment of the rent claimed by him; that, consequently, the fire bricks seized by Plaintiff, and claimed by intervening party, were pledged, for the payment of said rent: whereupon he prayed the dismissal of the intervention, and that the *saisie-gagerie* should be declared good and valid." To this exception, the intervening party filed, *firstly*, a general answer, *secondly*, a special answer, in which it is alledged:

"That after the passing of said deed of lease of the 12th day of May, 1849, at Quebec, to wit, about the month of June then next, Patrick Anderson being absent from this country, he said John Jones did lease said wharf to Thomas Anderson, and did deliver possession of said wharf to said Thomas Anderson, and said Patrick Anderson had not then or afterwards possession of the same: and it was agreed upon, by and between John Jones and Thomas Anderson, that the rent for the said year ending in May, 1850, amounting to the sum of £125 should be paid in bricks, and in fact said rent was so paid by Thomas Anderson to John Jones. By means whereof no rent for the said period, was or is due by Patrick Anderson, and therefore said bricks, the property of Thomas Carr, are not liable for said rent." The questions presented by these pleadings were:

1° "Whether a lease of the wharf and premises in question, was, on the 12th of May, 1849, made by John Jones, the Plaintiff, to *Patrick* Anderson, the Defendant?"

2° "Whether this lease was ever at any time afterwards revoked, by the parties thereto, or otherwise?"

3° "Whether John Jones, did, at any time afterwards, verbally lease the premises to *Thomas* Anderson?"

4° "Whether it was competent to the parties, interested in making it appear that the lease to Patrick Anderson had been revoked, and another, to Thomas Anderson, substituted in its place, to prove by parole evidence any facts from which such inference could be drawn?"

5° "Whether the rent of the wharf and premises for the period specified in the declaration, had ever been paid and satisfied?"

6° "If the rent was due, then whether the bricks seized in this cause were pledged and liable for same?"

Before the inscription of the cause upon the Roll of *enquêtes*, an order was obtained from one of the Justices of the

court below, for the examination of James Hossack, as a witness, as well on behalf of Defendant as of Intervening Party. On the 30th of June, 1851, motions were made, on behalf of Plaintiff, to have the papers, purporting to be the depositions of this witness, rejected and struck from the record, the same having been taken without authority and without notice to Plaintiff, and being otherwise illegal, as being parol testimoney in a case prohibited by law; and upon these motions the parties were regularly heard, and the questions, thereby submitted for the consideration of the court were taken *en délibéré*, but never afterwards adjudicated upon. The absence of any decision on this head constituted another ground of appeal in the case. The evidence on the part of Plaintiff was chiefly documentary. He filed: 1st. An authentic copy of the lease, upon which the action was brought, bearing date the 12th of May, 1849, 2d. An authentic copy of the lease, under which the premises had been held by the same party during the previous year, bearing date the 23d of May, 1848.

The evidence on the part of the Defendant and Intervening party was chiefly parol evidence.

Plaintiff objected to the admissibility of evidence of this nature to impugn the higher evidence contained in the deed of lease to Thomas, as the attorney of Patrick Anderson.

Thomas Anderson was examined as a witness. With respect to his testimony, in so far as it relates to any verbal lease, between him and the Appellant, the court below was moved, on the 12th day of December, 1850, to reject the same, on the ground that parol testimony could not legally be adduced of such a lease; and to set aside the ruling of Mr. Justice MEREDITH admitting said testimony. Upon this application, the parties were respectively heard, and, under an order for a rehearing, again heard, before a full Bench, the 24th of March, 1851. On the 12th of April following, the court, composed of Mr. Chief Justice BOWEN, Mr. Justice BACQUET, and Mr. Justice MEREDITH, pronounced the following judgment:

"The court, having heard the parties, upon the motion of John Jones, of the 12th day of December last, that the testimony of Thomas Anderson be rejected, considering that the paper-writing, marked A, produced by Plaintiff, at the time of his answering upon *faits et articles*, on the 16th day of October, 1850, and the answers of Plaintiff, as well to the said interrogatories as to the supplementary interrogatories submitted to him by Intervening Party, form no *commencement de preuve par écrit* to justify in law the adduction of said testimony now offered by said Intervening Party, Thomas Carr, the court doth set aside the order pronounced by the

honorable William Collis Meredith, one of the justices of this court, on the 12th day of December last, by which the objection made by Plaintiff to the adduction of such parol evidence on behalf of Thomas Carr, Intervening Party, was overruled."

The deposition of Hossack, which was objected to, went to establish that the bricks in question had been consigned by Thomas Carr, the Intervening Party, to Thomas Anderson, and that they had been landed and piled on the wharf rented by Thomas Anderson [as he says] from the Plaintiff, and that they had been seized by Plaintiff upon a claim for rent. Patrick Anderson, the Defendant, had not been in this country in the year eighteen hundred and forty-nine. He then attempted to prove that the wharf was leased to Thomas Anderson, his employer, and that Thomas Anderson, had taken possession of the wharf, and carried on his business there as a commission merchant.

The parties having been heard upon the merits, the court below, composed of DUVAL and MEREDITH, Justices (on the 28th July, 1851), pronounced the following judgments:

1st. Upon the demand in chief.

" The court considering that, by the evidence adduced, it is established that the rent claimed by Plaintiff, by his present action, was duly paid to him on the sixth day of September, one thousand eight hundred and forty-nine, doth dismiss the action of Plaintiff.

2dly. Upon the demand in intervention.

" The court having heard the parties upon the merits of their contestation in this cause raised, between Thomas Carr, the Intervening Party, and John Jones, Plaintiff in chief, considering that, by the evidence adduced, it is established that the Intervening Party, Thomas Carr, is the true and lawful owner of the twenty-eight thousand and ninety-six fire bricks and two hearth stones in this cause seized at the instance of Plaintiff; and considering further, that at the time of the seizure, the rent, for securing the payment of which the said fire bricks were seized, had been paid, to Plaintiff, doth order and adjudge that the said fire bricks and hearth stones be forthwith restored and delivered up to Thomas Carr.

From these judgments, Jones had instituted these appeals. Appellant submitted the following points:

1. " That the rent, for the payment of which the bricks in controversy had been seized, was in arrear and unpaid at the time of the seizure."

2. " That the privilege granted by the Custom of Paris to proprietors of houses upon the furniture in them, for the rent, and the incidents thereto, extended to goods and effects

in stores and upon wharves, for the purpose of trade and merchandizing. (161 Article of Custom of Paris, and Prov. Ord. 2 Vic., cap. XLVII, sec. 2)."

The Respondent argued, that if the rent, was really due, to the Appellant, he ought nevertheless to have established: "That Thomas Anderson had power to pledge Carr's property; that, in point of fact, he had done so, and that he had deposited the bricks seized, as security for the rent; or, that the merchandize belonging to a third party, by being placed upon a wharf, thereby becomes liable for such rent as the lessee of a wharf may owe to the lessor."

The Respondent also argued, that Appellant had not placed his claim upon the footing of a landlord's right against the moveables of a sub-tenant, to the extent of the latter's liability to his lessor.

ROLLAND, juge: "Je suis porté à croire que la défense du Défendeur est mauvaise. La première défense, savoir, qu'un bail a été fait à un tiers, ne semble pas une défense à l'action, à moins que l'allégué, que ce second locataire a pris possession, ne soit considéré comme l'allégué d'un défaut d'accomplissement par le bailleur de ses obligations; mais je ne le crois pas. Quant à la seconde défense," que la rente ou loyer a été payé," sans dire par qui, quand, ni comment, elle est également mauvaise à moins qu'il n'y eût preuve de paiement en deniers par le Défendeur. Mais la preuve offerte est de transactions avec un tiers, par lesquelles l'on prétendrait que ce tiers, quoique agissant pour lui-même, se disant le locataire, au lieu du Défendeur, aurait donné des effets en paiement des loyers dus par le Défendeur; je demande, comment faire application de cette preuve à la défense telle que plaidée?

Le statut de la 12 Vic. veut que la défense contienne, comme la demande, une articulation de faits; et cela est raisonnable, pour éviter qu'il soit permis à un Défendeur, comme autrefois, sur une dénégation générale ou une défense générale de paiement, de prouver tout ce qui lui plaira, sans que le Demandeur ait pu prévoir quelle serait la preuve offerte, ce qui le prive d'exceptions et d'objections, et de faire preuve du contraire, parce qu'il ne peut être prêt à rencontrer ce qu'on lui oppose par cette preuve.

Avant d'entrer dans l'examen des preuves, il faut voir si la défense est valable.

Je ne puis voir dans cette défense à l'action, que celle faite par le nommé Thos. Anderson, frère du Défendeur, et dans la défense, comme dans la preuve (surtout dans la déposition de ce nommé Thos. Anderson), je n'aperçois qu'une idée," que lui était le locataire, et que lui a payé de ses propres deniers." Je ne puis m'empêcher d'observer les contradictions dans la dépo-

sition de ce témoin intéressé, où il affirme, en se contredisant, qu'il a payé pour lui-même, et un peu plus loin, qu'il a payé pour son frère, l'une des deux propositions devant nécessairement être fausse. Evidemment, le Défendeur n'a pas pu donner comme instruction à son avocat, qu'il avait, lui, payé. Et pourtant, ce doit être la seule défense, et aussi la seule preuve possible, à moins qu'on ne considère la première défense comme valable ; mais son avocat, en plaidant, a déclaré ne pas insister sur cette première défense. Le fait donc de l'acquittement de la dette paraîtrait devoir ne pas occuper les juges, et, pourtant, c'est la seule chose sur laquelle la Cour Inférieure a jugé, et que les parties semblent nous avoir soumise. L'on a paru prétendre que sur un plaidoyer de paiement, il suffisait de prouver que le créancier avait reçu des effets et marchandises d'une valeur égale au montant de la dette, pour pouvoir dire qu'elle est acquittée ; mais c'est une erreur, il faut de plus que le créancier ait reçu ces choses en paiement, et qu'il y ait convention à cet effet, autrement le débiteur qui a donné ces valeurs n'a que l'exception d'une dette à opposer en compensation. Je le dirais surtout sur tout sur un plaidoyer de paiement sans dire comment le paiement a été fait. Si la cour est d'avis que le Défendeur n'a pas établi qu'il a payé la dette, de la seule manière qu'il pouvait le faire d'après sa défense, il ne reste plus que l'intervention, et la question se réduit à savoir, si les choses saisies, appartenant à un tiers, pouvaient être saisies-gagées comme des meubles meublants dans une maison, appartenant à un autre que le locataire. J'avoue que j'ai eu beaucoup de doute à ce sujet. Les quais ont un caractère tout à fait particulier. Le navigateur et le commerçant sont appelés à en faire usage. Ils y déposent leurs marchandises ou autres effets, tel que le grément des vaisseaux, et ils ne peuvent s'en dispenser. Sera-t-il dit qu'ils seront obligés de s'informer si le locataire du quai a payé son loyer, ou si le possesseur en est propriétaire, et faudra-t-il qu'ils s'en éloignent pour ne pas s'exposer à voir saisir leurs propriétés ? Dans la jurisprudence l'on a tenu les effet des tiers, servant à garnir ou meubler la maison, les marchandises mêmes des tiers, dans un magasin, comme sujets au paiement du loyer. Mais, dans l'un et l'autre cas, le dépôt est volontaire, et fondé sur la confiance que la partie a dans ces locataires, et dans leur solvabilité pour la garantir. L'on ne peut pas dire cela de celui qui aborde à un quai pour y décharger son vaisseau. Il y est invité comme à un lieu public, où il doit trouver protection, sans danger d'une saisie ou d'un procès. Mais, l'on dira qu'il peut se libérer en payant comme le sous-locataire. Je ne vois pas identité. D'ailleurs, cette question doit avoir été jugée, et en France, et ici. Elle mérite bien de l'être, de manière à fixer la

jurisprudence, si elle ne l'est pas. Que le locataire ne puisse se refuser à la gagerie pour les loyers qu'il doit, cela se conçoit, mais c'est tout autre chose quand il s'agit d'un tiers. Sur ce point, je suis disposé à adopter l'opinion de M. Troplong, *Priv. et Hyp.*, vol. I, n° 153. L'on a cité en cette cause le jugement rendu en appel en janvier 1840, et qui est rapporté à la page 317, du 2e vol. de la Revue de Légis. et de Juris. du Bas-Canada, (2 *R. J. R. Q.*, p. 244.) (Jones et Lemesurier.) Cette partie du sommaire de ce rapport, où il est dit : " On peut saisir pour paiement du loyer d'un quai les effets et marchandises mis sur ce quai," n'est pas exacte. Ce point n'y a pas été jugé d'une manière aussi absolue. (1) La cour à l'unanimité infirme les jugements rendus en cette cause par la Cour Inférieure.

(1) In appeal, 20th January, 1840, Jones and Lemesurier, a case reported in the 2 Revue de Légis., et de Juris., p. 317 ; 2 R. J. R. Q., p. 244.

Quant au droit de saisir des marchandises sur un quai par voie de saisie-gagerie pour loyers de tel quai.

Having had communication of the notes of Honorable Mr. Justice ROLLAND who rendered judgment in that case, with Messrs. Pemberton, Moffatt and DeRocheblave, we are enabled to give the following additional report in relation to the right of seizing goods upon a wharf for wharf rent. In that case, Plaintiff had proceeded by way of *saisie-gagerie*, upon affidavit, as may be seen by the following remarks :

ROLLAND, Justice, having delivered the opinion of the court upon a question of novation raised in the cause, added :

" But we are next to pronounce on the validity of the seizure obtained by the Appellant, and his privilege on the goods seized on the premises. This seems to be of importance in the case, and it is a question not yet settled in this country, and upon which a variety of opinions exist.

If this were the case of a lease of a wharf an open space an *area*, as called in the Roman law, although a *prædium urbanum*, or a *grande cour*, to use the language of some French authors, we should have considerable difficulty in saying (as was contended) that it came within the Art. 161, of the Custom, providing a remedy for lessors of houses, *maisons*, and I must say, that I, as at present advised, would be against extending this privilege of a right to saisie-gagerie, against the express language of the law. For it is a principle that privileges being against the common law are not to be extended. We come next to view the case as that of a lease of a store, *magasin*. This is nearer to a lease of a house, for a store may be a house called by Brodeau *mansio*, *domus*. It may be the habitation of man ; then there would be no doubt, as Mr. Pothier says, that the law would apply. But this store may not be a house in that sense of the word, a dwelling house. We know not whether the store in question was so or not.

As the landlord's privilege on the goods exists, in our opinion (under the 171st Article of the Custom) and in this we have no doubt to pronounce against the pretensions of the Respondents in their plea), we are led to consider whether this saisie-gagerie was or not legally issued in the present case, under the provisions of that 171st Article of the Custom, to secure the rights of the landlord. This 171st Article gives the *droit de suite* in certain cases, namely, of the goods seized by other creditors, or of such as were removed, and, I would say, about to be removed. Now, every remedial law must be interpreted so as to carry into effect the views of the legislator. What would be the writ to be issued to exercise this *droit de suite* ? Would it be any thing else than a writ of saisie-gagerie which means, as translated by Brodeau, *captio pignoris*, and although, in most cases, this was done after a seizure by creditors, or removal from the premises, surely if there is evidence, and (we have the admissions of the Respondents to that effect) that the goods

PANET, juge : Je concours dans le jugement qui va être rendu en cette cause, mais je ne partage pas l'opinion du président de la cour quant à la manière de plaider et de prouver le paiement. Je suis disposé à adopter, en matière de preuve, sur des affaires de commerce, les règles de la jurisprudence anglaise, comme je suis forcé de les suivre dans le mode de procédures applicables au procès par jury. Je crois que le paiement, opposé à la demande en cette cause, était suffisamment allégué, mais la preuve est insuffisante. Il est évident que le Défendeur a voulu faire un double emploi du paiement fait au moyen des briques transportées au Demandeur.

AYLWIN, Justice, concurred. (1)

The judgments in Appeal are as follows :

JUDGMENT ON PRINCIPAL DEMAND : The court, considering

were to be sold, and therefore removed, there can be no objection that the landlord should prevent this injury to his rights, which injury was contemplated. The Defendants cannot complain.

Whatever might have been the difficulty in maintaining a *saisie-gagerie* under the 161st Article, where no removal of goods is taking place, if we can view this *saisie* as having taken place under the 171st Article, we should maintain it. For it is evidently for the purpose of justice, that we should secure a privilege to the landlord on goods which are his pledge, whether they be in a house, a store, a wharf or a farm. The Article 171 is by all authors declared to grant the privilege to landlords whether of a *prædium urbanum* or a *prædium rusticum*. It includes all lessors of real estate.

But there is another circumstance that induces us to distinguish this case from that of a common *saisie-gagerie* taken as a matter of course : Here the writ called *saisie-gagerie* (it might be called *saisie-arrêt*), is issued upon an affidavit shewing the necessity of a seizure to secure the rights of privilege vested in the landlord. The name is of little consequence, if the seizure to be made under it is legal.

Indeed, I would say, that *saisie-gagerie* is the correct name, it is a *saisie du gage, captio pignoris* ; and who can say that the creditor having those rights to secure, which, we are of opinion did belong to him, was not entitled to attach those goods under the circumstances ? For these considerations, the court is disposed to maintain this seizure without expressing any opinion on the legality of the *saisie-gagerie*, in the common course, for the rent of a wharf or open space, or other property that might fall within the description of the *prædium urbanum* of the Romans, to which allusion is made by Duplessis speaking on the 161st Art. of the Custom, when he says : " le mot *maison* représente ici les héritages *urbains* des Romains, &c." We have taken some trouble in expressing out opinion that improper inferences may not be drawn from the present decision.

(1) At the time of the argument of this case, an objection was raised by the court as to the jurisdiction of the Court below and of the court Appeals in the matter, inasmuch as the Defendant had not been served, but an attorney had come forward and appeared for him, without service of process. The parties were requested to cite authorities to establish that this could lawfully be done. The Defendant contended that this irregularity, if it was one, had not been pleaded by the adverse party, and that it could only be taken advantage of by the Defendant himself, by means of a *désaveu*. Upon this point he cited :

1. Condensed Louisiana Reports, p. 10 ; 3 Ency. de Juris., *verbo* Désaveu ; Serpillon, 617 ; N. Dén., vbo. Désaveu ; 1 Merlin, Q. de D. *verbo* Assignation 609-612 ; 7 Poth., P. Civ. ; Welsby, Exch. Rep. &c. This point was afterwards overlooked, the parties having agreed to try the merits of the case.

that Appellant has established, by legal proof, that, at the time of the bringing of this action in court below, the sum of sixty-eight pounds, fifteen shillings, was due and payable to him by Respondent, for arrears of rent accrued under the deed of lease, of the twelfth of May, one thousand eight hundred and forty-nine, declared upon, and that the exceptions pleaded by Respondent, in the court below, were irregular and insufficient in law, and, moreover, that Respondent failed to establish the same, by legal evidence, and that, therefore, in the adjudication of the court below, that the rent claimed by Appellant was duly paid to him, on the sixth day of September, one thousand eight hundred and forty-nine, there is error; the court here, doth reverse the said judgment rendered in the court below, on the twenty-first day of July last past; and proceeding to render such judgment as the court below ought to have rendered, doth condemn Respondent to pay to Appellant the said sum of sixty-eight pounds fifteen shillings, current money of this Province, as and for such arrears of rent, with interest thereon, from the twenty-ninth day of April, one thousand eight hundred and fifty, till paid, and costs of suit, as well in this court as in the court below; and further, the court maintains the attachment of the twenty-eight thousand and ninety-six bricks and two hearth stones, effected under the process of *saisie-gagerie* in this cause issued, to serve and avail Appellant as security for the payment of his said rent, as by law provided.

JUDGMENT ON THE INTERVENTION : The court, considering that the quantity of twenty-eight thousand and ninety-six fire bricks and two hearth stones, claimed by Respondent in and by his demand in intervention in the court below, were legally seized and attached under process of *saisie-gagerie* sued out, by Appellant, to enforce and secure a lawful demand for rent in arrear due and owing to him by Patrick Anderson, Defendant in the court below, for the use and enjoyment of the wharf, and premises in question in this cause : and that the said bricks and hearth stones, at the time of the seizure thereof, were liable and subject, by law, to the privilege of the landlord, *super invectis et illatis*, as goods and merchandize stored and kept and placed, for deposit and sale, upon the said wharf and premises, by the authorized agent and factor of Respondent, who, under the statute in this behalf, to wit : the statute of the 10th and 11th Victoria, cap. x, had power to pledge the said goods and merchandize of the Respondent ; and that, in the judgment of the court below, by which it is declared and adjudged, that at the time of the said seizure, the rent, for securing the payment of which the said fire bricks and hearth stones were seized, had been paid to Appellant, there is error, inasmuch as the

Respondent hath wholly failed to establish such payment by legal proof, doth reverse the said judgment, and proceeding to render such judgment as the court below ought to have rendered, doth dismiss the said demand in intervention. (2 *D. T. B. C.*, p. 154.)

JONES, for Plaintiff.

ROSS, DAVID, for Defendant.

HOLT and IRVINE, for Intervening Party and Respondent.

PROCEDURE.—PLAIDOYERS.

COUR SUPÉRIEURE, Québec, 16 mai 1852.

Présents : DUVAL et MEREDITH, Juges.

TRUDELLE *vs.* ALLARD.

Jugé : Qu'on ne peut mettre en question la légalité d'une exception ou d'un plaidoyer quelconque (*plea*) qu'au moyen d'un *demurrer* (défense en droit), contenant les moyens de droit qui l'on entend faire valoir contre telle exception ou plaidoyer.

A l'action du Demandeur, le Défendeur ayant plaidé par une exception perpétuelle, le premier y répliqua généralement, et inscrivit la cause sur le rôle de droit, pour plaider l'illégalité des chefs de l'exception et les faire rejeter.

Lors de l'audition en droit, le Défendeur prétendit que le Demandeur ayant répliqué généralement à son exception, avait par là accepté la contestation, et ne pouvait plus en contester la légalité, sur une simple audition en droit. Il cita une décision rendue dans la Cour Supérieure, à Québec, le 20 décembre 1850, *Brillard* vs. *Kinghorn*, et la 35e règle de pratique, qui requiert que toute défense en droit devra contenir les raisons sur lesquelles elle est fondée.

Le Demandeur invoqua l'usage suivi pendant plus de trente ans dans la Cour du Banc de la Reine, et cita aussi une décision de la Cour Supérieure, Québec, rendue le 3 juin, 1850, *Jones* vs. *Anderson*, par laquelle une motion, pour rejeter un *demurrer*, parcequ'il ne contenait pas l'énumération des moyens de droit, fut rejetée par MM. DUVAL et MEREDITH, juges. Il observa que la règle de pratique ne s'applique qu'à une défense en droit, offerte comme réponse à une action et non aux répliques aux exceptions.

DUVAL, juge : Il est vrai que, dans la ci-devant Cour du Banc du Roi, la pratique était de répliquer généralement et d'inscrire pour être entendu en droit sur la légalité des exceptions ou plaidoyers. Quand Sir JAMES STUART a été promu au Banc, il a introduit la pratique de ne mettre en question la légalité d'une défense qu'au moyen d'un *demurrer*, ou défense

en droit: Nous croyons cette pratique plus logique et plus avantageuse, et nous l'avons adoptée, et nous entendons la maintenir par la suite. Nous avons décidé, dans la cause de *Brillard* vs. *Kinghorn*, que le *demurrer* devait contenir les raisons sur lesquelles il était fondé : quant à la cause de Jones et Anderson, où l'on prétend que le contraire a été jugé, mon opinion individuelle a été guidée dans cette cause par d'autres considérations, et mon attention n'a pas été appelée en particulier sur le point dont nous nous occupons. La règle que nous établissons est conforme d'ailleurs à la règle de pratique, s. 35.

MEREDITH, juge: Dans la cause de *Jones* et *Anderson*, accoutumé comme je l'étais à la pratique de Montréal, je n'ai pas hésité, pour ma part, à décider qu'une audition en droit pouvait avoir lieu, sans une défense en droit spéciale, *(special demurrer.)* Mais la majorité de la cour ayant depuis exigé une telle défense, je h'hésite pas à adopter un mode de procédure qui, s'il n'est pas dans la lettre de la règle de pratique, qui ne parle que de défense en droit, est du moins conforme à l'esprit de cette règle.

Le jugement est comme suit ;

La cour, vu que le Demandeur a lié contestation avec le Défendeur, en filant une réponse générale à l'exception perpétuelle du Défendeur, ordonne que les parties procèdent à la preuve. (2 *D. T. B. C.*, p. 178.)

TASCHEREAU, J. T, pour le Demandeur.

BELLEAU, pour le Défendeur.

ERREUR, OBLIGATIONS.

COUR DU BANC DE LA REINE, EN APPEL, Montréal, 11 juillet 1851.

Présents : ROLLAND, PANET et AYLWIN, Juges.

LEPROHON, Appelant, et LE MAIRE, &c., DE MONTRÉAL, Intimés.

Jugé: 1. Que l'erreur de droit peut donner ouverture à l'action en restitution.

2. Que dans l'espèce, un citoyen qui a volontairement payé une taxe imposée par un règlement de la corporation municipale que la cour déclare nul, a droit au remboursement de ce qu'il a ainsi payé.

Dans le mois de novembre 1849, en la Cour du Banc de la Reine du district de Montréal, l'Appelant institua une action *condictio indebiti* contre les Intimés, pour le recouvrement d'une somme de £65, cours actuel, qui fut rapportée le 7 janvrie, 1850, en la Cour Supérieure.

La déclaration alléguait que le Demandeur, résidant dans la cité de Montréal, avait été, dans le mois d'octobre 1842, nommé,

suivant la loi à cet égard, inspecteur de potasse et perlasse pour la dite cité de Montréal, et que depuis ce temps il avait continué de l'être et l'était encore, et avait toujours joui et jouissait encore de tous les avantages, émoluments, privilèges et exemptions attachés à sa charge ; que, dans le cours de l'année 1845, les cotiseurs pour la cité de Montréal pour la dite année, avaient, par erreur, cotisé le Demandeur, comme inspecteur de potasse et perlasse pour la dite cité de Montréal, pour une somme de £30, cours actuel, laquelle somme lui, le Demandeur, avait payée entre les mains du trésorier des Défendeurs, le 15 novembre 1845, et ce par erreur et sans cause, et sous la fausse impression où il avait été mis par les Défendeurs, qu'il était tenu envers eux au paiement de cette somme de £30. Que, dans le cours de l'année 1846, les cotiseurs, pour la dite année, avaient par erreur, cotisé le Demandeur, comme inspecteur de potasse et perlasse, pour une somme de £35, cours actuel, laquelle somme le Demandeur avait payée entre les mains du trésorier des Défendeurs, le 17 décembre 1846, et ce par erreur et sans cause, et sous la fausse impression où il avait été mis par les dits Défendeurs, qu'il était tenu envers eux au paiement de cette somme de £35.

Le Demandeur allégua, de plus, que depuis la dite année 1846, il avait cessé d'être cotisé comme inspecteur de potasse et perlasse ; et que, pour les raisons ci-dessus, il avait le droit de répéter des Défendeurs le remboursement des deux sommes de £30 et de £35, qu'il leur avait payées par erreur et sans cause, et concluait à ce que les Défendeurs fussent condamnés à lui payer la somme de £65.

A cette action les Défendeurs plaidèrent que, par un règlement du conseil, passé le 29 avril, 1845, suivant et conformément à la loi et au statut en tel cas fait et pourvu, il était, entre autres choses, nommément, par la section 43, statué et ordonné, qu'un droit annuel serait et était imposé sur toute et chaque voûte ou hangar d'inspection dans la cité de Montréal, et sur tout le local occupé ou employé, aux fins de leurs affaires, par les inspecteurs de potasse, perlasse, bois, bœuf, farine, lard ou d'aucune autre sorte ou description de produits ou marchandises quelconques, et tel droit serait payable, le 1er mai de chaque année, par l'occupant ou les occupants de tel local, sur le pied de £10, par chaque £100, de la valeur cotisée chaque année, sur tel local occupé ou employé pour les fins et objets ci-dessus, ou par le propriétaire ou les propriétaires de tel local, si le droit n'était pas payé par, ou ne pouvait pas être prélevé de tel occupant ou occupants ; que la somme de £30, que le Demandeur alléguait avoir payée aux Défendeurs en 1845, était pour le droit dû par le Demandeur aux Défendeurs, en vertu du dit règlement, pour la dite année 1845,

comme occupant un local situé dans l'arrondissement de la cité de Montréal, et par lui occupé et employé pour ses affaires comme inspecteur de potasse et perlasse pour la dite cité de Montréal ; et que la somme de £35, que le Demandeur alléguait avoir payée aux Défendeurs, en 1846, était pour le droit dû par le Demandeur aux Défendeurs, en vertu du dit règlement, pour 1846 ; que lors des paiements ainsi faits par le Demandeur aux Défendeurs dans les années 1845 et 1846, le règlement en question était en existence et dans sa pleine force et vertu, ce que le Demandeur était tenu de connaître, comme citoyen de la cité de Montréal ; que le dit Demandeur, en faisant les dits paiements, ayant eu connaissance du règlement, s'était sciemment et volontairement soumis aux dispositions du règlement, et était non recevable à demander le remboursement des sommes d'argent par lui payées, en vertu du règlement dont il n'avait jamais contesté la validité, et dont il ne contestait pas la validité, même par sa demande.

Aux exceptions et fins de non-recevoir plaidées par les Défendeurs, le Demandeur dit que la section 43 du règlement était, dans son esprit et dans ses effets, en contradiction directe à l'esprit et à la lettre des statuts de la 6 Vict., ch. VI, et 8 Vict., ch. LIX, et que la dite section 43, était nulle, comme étant une violation des lois et statuts existants pour régler l'inspection de la potasse et perlasse, et pour l'incorporation de la cité de Montréal, attendu que le Demandeur, comme inspecteur de potasse et perlasse pour la cité de Montréal, ne pouvait être ni cotisé, ni taxé, n'étant point du nombre des personnes que les Défendeurs pouvaient cotiser et taxer conformément à la loi; que la dite section du règlement n'avait jamais donné aucun droit aux Défendeurs de faire payer au Demandeur les sommes de £30 et £35, et que, les ayant payées sans cause, il avait droit d'en demander le remboursement.

Dans cette réponse spéciale, le Demandeur conclut simplement au renvoi des exceptions péremptoires.

A cette réponse, les Défendeurs répliquèrent en niant au Demandeur le droit d'invoquer la nullité de ce règlement, de la manière qu'il le faisait dans sa réponse spéciale.

Le deux septembre 1850, la cour rendit le jugement suivant :

" The court, considering that Plaintiff hath failed to esta-
" blish any error of law from which any legal cause of action
" could arise, and considering that the payment by Plaintiff
" to Defendants, of the amounts of the two several taxes
" levied on him, for the occupation of the premises occupied
" by him as an inspection store, was an entirely voluntary
" payment, without any coercion, or shadow of coercion, on
" the part of Defendants, or any deception whatever, and

" made in virtue of a subsisting by-law, the legality of which " was never called in question before the bringing of this " present action, and with a full knowledge of the powers " vested in said corporation and the existence of said by-law, " and considering that, by the law incorporating the said city, " the Mayor's Court is established for the purpose of hearing " any contestation which might arise touching the validity or " legality of any by-law of said corporation, the voluntary " payment of the said tax by Plaintiff, with a full knowledge " of all the circumstances and of the law, is tantamount to a " waiver on his part of any objection thereto, doth dismiss the " said action."

MONDELET, Justice, dissenting.

SMITH, juge : En prononçant ce jugement, énonça comme principe, que tout paiement fait par une personne qui a pu connaître toutes les circonstances sous lesquelles elle faisait tel paiement, était valable et ne pouvait être répété. Il cita comme précédent la cause de *Elliott* vs. *Walker*.

C'est de ce jugement que le présent appel était interjeté ;

CHERRIER, pour l'Appelant : Personne ne doit s'enrichir aux dépens du bien d'autrui. Un particulier ne peut retenir ce qu'il a reçu ou lui avait été payé sans cause ni raison. Pourquoi la corporation aurait-elle un privilège qu'un simple particulier n'a pas ? C'est un corps public nommé pour régler certains droits et devoirs de la communauté, mais non pour spolier et dépouiller ceux qui l'ont constitué, et ce en défiant le texte de lois précises et qui limitent son autorité à de justes bornes.

Son droit de taxer certaines classes de citoyens dans certains cas, doit être restreint dans les limites que la législature lui a tracées ; prétendre ou sanctionner le contraire, serait violer les droits les plus sacrés du citoyen.

La 57e section du ch. LIX, 8 Victoria, frappe, par avance, de nullité tout règlement de la corporation qui serait fait contrairement à la loi du pays ; et le règlement du 29 avril 1845, section 43, est en contradiction flagrante avec la 50e section du statut précité, qui délègue le pouvoir de taxer, en certains cas, certaines personnes, du nombre desquelles n'est point l'Appelant.

L'Appelant ne peut pas être présumé avoir payé volontairement dans un sens absolu, lorsque l'autorité municipale se présentait chez lui pour lui demander le paiement de sommes d'argent, que la bonne foi qu'il lui supposait lui a fait payer sans difficulté, sous l'impression que la loi lui en faisait un devoir, tandis qu'il n'était que la victime de l'erreur des Intimés qui ont assumé un droit qu'ils n'avaient pas, qu'ils reconnaissent aujourd'hui même n'avoir pas, tout en prétendant néanmoins que l'abus de leur pouvoir doit leur profiter, et que l'Appelant doit souffrir de sa bonne foi.

Prétendre qu'il a voulu donner, serait tout aussi étrange ; un don sous de pareilles circonstances ne peut être présumé.

Les motifs du jugement du 2 septembre semblent fondés sur ce que l'Appelant ne s'est pas plutôt plaint de l'illégalité du règlement du 29 avril 1845, et que la cour du maire, créée par la 70e section du ch. LIX, 8 Victoria, était seule compétente à déterminer cette question. C'est là une erreur. La cour du maire a été établie pour un tout autre objet, et il n'y a qu'un tribunal supérieur qui pouvait être saisi de la cause actuelle, qui est la seule ressource de l'Appelant pour obtenir le remboursement de ce qu'il a payé.

Sous l'empire du droit romain et de l'ancien droit français, la question du droit de la répétition d'une somme, payée par erreur de droit, a été souvent discutée parmi les jurisconsultes, et le plus grand nombre l'ont résolue dans l'affirmative.

Aujourd'hui, en France, sous l'empire du Code, il n'y aurait que la transaction ou l'aveu judiciaire, qui pourrait faire exception au droit de la répétition d'une somme payée par erreur de droit.

L'on a semblé prétendre, en cour inférieure, que pour décider cette cause, il fallait chercher des précédents devant les tribunaux d'Angleterre et des Etats-Unis, mais l'Appelant soutient avec confiance que les lois du pays sont les seules auxquelles on doit avoir recours, et ce d'autant plus qu'elles fournissent des règles sûres, claires et positives pour décider le point en contestation.

De la part des Intimés, les propositions suivantes furent soutenues :

1° Qu'il n'y avait aucune preuve de l'erreur alléguée par le Demandeur, lors des payements en question.

2° Que cette erreur, en supposant qu'elle ait existé et qu'elle eût été prouvée, ne peut être qu'une erreur de droit qui ne donnait pas un droit légal d'action. (1)

3° Qu'en supposant qu'il pourrait y avoir certains cas où l'erreur de droit donnerait lieu à la répétition de ce qui aurait été payé par erreur de droit, les payements faits par le Demandeur ne tombent dans aucune de ces catégories.

4° Que les payements faits par le Demandeur sont des payements volontaires, ayant été faits sans aucune protestation de sa part, et sous l'opération d'un règlement, d'une loi municipale que le Demandeur était tenu et obligé de connaître comme étant lui-même un des membres de la corporation pour laquelle telle loi municipale était faite et promulguée, laquelle loi était en force lors de ces payements.

5° Que lors même que l'on ne pourrait pas considérer ces

(1) V. art. 1047 C. C.

payements comme des payements volontaires, mais bien comme faits sous une erreur de droit, cependant, d'après la nature de l'objet pour lequel étaient faits ces payments, et l'emploi auquel étaient destinées les sommes payées par le Demandeur en 1845 et 1846, le Demandeur ne pouvait point en demander la répétition de la manière et dans le temps qu'il l'a fait.

JUGEMENT EN APPEL : La cour, considérant que la sect. 43, du règlement sous le n° 162, fait et passé par le maire, les échevins et les citoyens de la cité de Montréal, le 29 avril 1845, imposant une taxe de £10, par chaque £100 de la valeur cotisée, sur toute et chaque voûte ou hangar d'inspecteur, dans la cité de Montréal, employés aux fins de leurs affaires par les inspecteurs de potasse, perlasse et autres, outrepasse les attributions et pouvoirs accordés aux Intimés par le Statut de la 8 Vict., chap. LIX, et partant est nul et de nul effet ; vu qu'il est en preuve que les deux sommes d'argent réclamées en cette cause par l'Appelant, ont été reçues par les Intimés, et payées par l'Appelant en obéissance à la dite section du dit règlement, comme si elles étaient légalement dues, quoiqu'en point de droit icelles sommes n'étaient pas dues, la cour renvoie l'exception des Intimés, par laquelle ils ont prétendu la validité du dit règlement et le droit de se faire payer les dites sommes ; et, vu qu'en payant icelles sommes, l'Appelant n'a ni voulu en faire donation aux Intimés, ni transiger, et que, sans être précisément persuadé qu'il les devait, il a pu seulement le présumer, en conséquence des prétentions des Intimés d'avoir le droit de lui imposer une taxe en sa qualité d'inspecteur de potasse ou de perlasse ; vu que, nonobstant l'erreur de droit qui a engagé l'Appelant à payer les dites sommes, la voie de la répétition lui est ouverte, en autant qu'il s'efforce d'obtenir ce qui lui appartient, tandis que les Intimés désirent faire un profit à son détriment, et que les Intimés ne peuvent pas, en bonne conscience, retenir en caisse les dites sommes, après que la nullité de leur dit règlement a été jugé, contradictoirement avec le dit Appelant : la cour infirme le jugement dont est appel, et condamne les Intimés à payer à l'Appelant la somme de £65. (2 *D. T. B. C.*, p. 180.)

LA FONTAINE et BERTHELOT, Procureurs de l'Appelant.

CHERRIER, C. S., Conseil.

PELLETIER et BOURRET, Procureurs des Intimés.

DUNKIN, Conseil.

COUR SUPÉRIEURE, Québec, 10 décembre 1851.

Présents : DUVAL et MEREDITH, Juges.

PARADIS, Demandeur, *vs* ALAIN, Défendeur, et ZEAU, Adjudicataire et Opposant à la délivrance.

Jugé : Le défaut de contenance, dans un immeuble vendu par décret, donne droit à l'Adjudicataire de demander diminution de prix dans les proportions du prix d'achat et du déficit. (1)

L'Adjudicataire, Thomas Zeau, après l'adjudication à lui faite, informé qu'une partie de la terre à lui adjugée par le shérif, était en la possession d'une tierce personne qui avait un titre légal à cette partie de la propriété, fit faire un arpentage, dont le résultat fut d'établir un déficit dans l'étendue du terrain décrit par les avertissements du shérif.

En conséquence de ce défaut de contenance, l'Adjudicataire forma opposition réclamant, sur le prix d'adjudication, par priorité à tous autres créanciers, la somme de 12 £10s., valeur du déficit.

Par le projet de distribution, il fut colloqué pour cette somme.

Le Défendeur contesta alors l'opposition de l'Adjudicataire, alléguant 1° que, par la loi, cette opposition n'était pas recevable, et qu'elle n'était pas fondée en droit ; (2) 2° que l'avertissement du shérif, désignant la propriété comme ayant 1 arpent 4 perches et 9 pieds *ou environ* de front, l'Adjudicataire n'avait pas été induit en erreur, et ne pouvait réclamer ainsi qu'il le faisait ; 3° que l'Adjudicataire connaissait le déficit avant l'enchère, et qu'il n'était pas recevable à s'opposer.

Après enquête, la cour ordonna que, par experts, la proportion du déficit serait établie, et déclara que l'Adjudicataire, dans un décret forcé, avait droit à une diminution du prix de vente au *pro rata* du déficit.

Les termes du jugement sont comme suit :

La cour, vu les plaidoyers et la preuve de record, et après avoir entendu les parties finalement sur le mérite de la contestation liée entre le Défendeur et Thomas Zeau, Opposant à fin de conserver et adjudicataire en cette cause,ordonne que, par experts, la valeur du terrain décrit en l'opposition du dit Thomas Zeau, et dont il est devenu adjudicataire, non livré au dit adjudicataire, soit établie en égard au prix d'adjudication du dit terrain en son entier. (2 *D. T. B. C.*, p. 194.)

(1) V. art. 708 C. P. C.

(2) 2 *R. J. R. Q.*, p. 216.

Autorités citées par l'Opposant (1) :

BELLEAU, Procureur de l'Opposant.

CASAULT & LANGLOIS, Procureurs du Défendeur contestant l'opposition.

ENREGISTREMENT.

COUR SUPÉRIEURE, Québec, 26 avril 1852.

Présents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

NADEAU, Demandeur, *vs.* DUMON, Défendeur, et DIVERS, Opposants.

Jugé : Que pour la conservation des droits de propriété, il n'est pas nécessaire d'enregistrer les contrats de mariage dont ils résultent, et que conséquemment, des enfants représentant leur mère, peuvent réclamer la valeur de la moitié d'un propre ameubli, à titre de communs, lequel ils auraient laissé vendre. (2)

Le 3 novembre 1823, Ignace Dumon et Marie Leclaire, stipulent, par leur contrat de mariage, communauté de biens, avec clause d'ameublissement général. L'épouse meurt, et ses enfants, acceptant la communauté, réclament, par une opposition à fin de conserver, leur part de communauté, et notamment la valeur de la moitié d'un immeuble dépendant de cette communauté, en vertu de cette clause d'ameublissement. Ed. Lagueux, un créancier du Défendeur, leur objecte que le contrat de mariage n'a pas été enregistré.

TASCHEREAU, J. T, pour les Opposants Dumon : La première question à décider est de savoir si le contrat de mariage, en autant qu'il a rapport à la réclamation des enfants Dumon, ne doit pas être considéré comme un titre translatif de propriété, et la seconde si, étant titre translatif de propriété, et antérieur à l'ordonnance des bureaux d'enregistrement, il n'est pas exempt des formalités de l'enregistrement ?

MEREDITH, Juge : Nul doute que les actes translatifs de propriété, antérieurs à l'Ordonnance, ne soient exempts des formalités de l'enregistrement. La 1ère section de l'Ordonnance 4 V., ch. XXX, qui a rapport aux nouveaux actes, énumère les actes qui comportent l'aliénation des immeubles dans la catégorie des actes à enregistrer ; il n'en est pas ainsi de la 4ème section, qui a trait aux anciens actes : tous les termes, qui com-

(1) Duvergier, *Vente*, n° 300 ; Pothier, *Traité de la procédure civile*, ch. XI, sec. 7, page 254, de l'effet de l'adjudication ; 1 Troplong, *Vente*, nos 92, 433 ; Duranton, n° 265, sur l'article 731, du Code de procédure; Domat, *Vente*, titre II, sec. 9, § 14, page 49.

(2) V. art. 2098 C. C.

portent l'idée d'aliénation, y sont omis ; les mots *conveyance* et autres du même genre ne s'y trouvent pas. Evidemment la 4ème section n'exige que l'enregistrement des actes constitutifs d'une dette ou créance, à l'effet de conserver l'hypothèque. Dans la réclamation des enfants Dumon, comme dans le contrat de mariage sur lequel ils la fondent, il y a bien un droit de propriété : il n'y a point assurément de dette ou créance.

TASCHEREAU. Le droit de propriété réclamé par les enfants Dumon existerait également par rapport aux conquêts, quoiqu'il n'y eût pas de contrat de mariage, et conséquemment de document à enregistrer.

DUVAL, juge : La raison de douter est que, par le défaut de l'enregistrement, partie du contrat de mariage serait de nul effet, et partie serait valable, ce qui semble anormal.

TASCHEREAU : S'il y avait dans ce contrat une donation non insinuée, elle pourrait être nulle sans que les autres stipulations en fussent affectées.

MEREDITH, juge : Il en serait ainsi d'un contrat de vente, non enregistré, antérieur à l'Ordonnance, il serait valable comme titre translatif de propriété, quoique de nul effet quant à l'hypothèque du vendeur.

GAUTHIER, pour l'Opposant Lagueux : Ce n'est que par la stipulation contenue au contrat de mariage que les propres, dont les enfants Dumon réclament la moitié, ont été ameublis. La nature de cet immeuble a été changée, et les tiers sont intéressés à le savoir. J'estime que cette réclamation se trouve comprise dans le terme général de "droits" dont il est fait usage dans la 4e section.

MEREDITH, Justice : We have already held, in several cases, that all privileged and hypothecary rights resulting from marriage contracts executed before the passing of the Registry Ordinance, were subjected to the formality of registration, by the fourth section of that law ; and we regard it as indisputable, that the formality of registration was not rendered necessary, as regards rights of ownership, *droits de propriété*, acquired before the registory law came into effect.

The decision of the present controversy must therefore depend upon this single question :

Was the right acquired by Marie Leclaire, under her marriage contract, to the property in question, and which, upon her death, passed to her heirs, a right of ownership, *droit de propriété ?*

The effect of the *clause d'ameublissement général* was to make the property in question, which otherwise would have remained the exclusive property of the husband, the joint property of the husband and wife ; and, upon the death of the wife, one half of the property in question vested by mere

operation of law in her heirs. (1) The interest which the wife thus acquired, and which afterwards passed to her heirs, was plainly something more than a mere privilege or hypothecary right, it was a right of ownership, (2) and having been acquired under a contract executed before the registry law came into effect, was not subjected to the formality of registration.

Consequently, the contestations founded on the non-registration of the marriage contract must be dismissed.

Had the *clause d'ameublissement* been *indéterminée*, the case might have presented some difficulty, but as to the effect of a *clause d'ameublissement général* or *déterminé*, I think there cannot be any doubt.

Le jugement est en faveur des enfants Dumon :

" La cour, considérant que les droits des Opposants ne sont pas des droits hypothécaires, mais des droits de propriété ; que ces droits résultent du contrat de mariage d'Ignace Dumon et Marie Leclaire, son épouse, en date du 3 novembre 1823, et qu'il n'était point nécessaire de faire enregistrer ce contrat, pour conserver les droits de propriété qui en résultaient, renvoie les contestations des collocations des enfants Dumon." (2 *D. T. B. C.*, p. 196.)

GAUTHIER & LEMIEUX, pour E. Lagueux.

TASCHEREAU, pour les Opposants Dumon.

ASSURANCE CONTRE L'INCENDIE.

COURT OF QUEEN'S BENCH APPEAL SIDE, Quebec 18 janv. 1854

Before ROLLAND, PANET, AYLWIN and MONDELET, Justices.

CASEY, Plaintiff, Appellant, and GOLDSMID et al., Defendants, Respondents.

Jugé : Qu'une police d'assurance, décrivant la propriété assurée comme une maison bornée en profondeur par un hangar en pierre couvert en fer-blanc, et par une cour, où l'on construit un hangar de première classe qui communiquera avec la maison assurée, n'est pas incorrecte ni nulle, quoiqu'il fût prouvé, qu'entre la maison et le hangar il y avait un autre bâtiment couvert en bardeaux, communiquant par des portes aux deux autres bâtiments, en autant que l'omission de mention de telles portes dans la description, n'était pas prouvée être une suppression frauduleuse, et en autant qu'il n'était pas établi que le feu s'était communiqué et étendu au moyen de ces couvertures. Le jugement de la Cour Supérieure, affirmant la doctrine contraire, infirmé.

(1) V. art. 1390 à 1395 C. C.

(2) 2 Ferrière, *Coutume de Paris*, p. 63, sur l'article 220. § 2 des ameublissements, No 6 : " En effet, l'ameublissement étant une aliénation, une espèce de vente que la femme fait à son mari, ou le mari à sa communauté, &c " ; 3 Troplong, *Contrat de Mariage*, p. 500, No 1984 ; Pothier, *Communauté*, No 307 à 310.

This action was brought by Plaintiff against "The Globe Insurance Company," upon a policy, dated the 21st June, 1850, reciting therein that Plaintiff had paid to Defendants, for premium, to the 30th day of May, 1851, £11, for carpenters at work, £1, and for policy, 5s., for the insurance from loss or damage by fire to the amount of £1000 currency, *on goods and merchandizes, contained in a building three stories high, and a garret, build with stone and covered with tin, clapboarded on one side, owned by the Seminary of Quebec, and occupied by the assured as a dry goods store and dwelling, and by James Hazlett, as a grocery store and dwelling, situated in Fabrique street, upper town, Quebec, forming the corner of Hope street and Fabrique street, bounded, on one side, by a similar class house, occupied by J. S. Auld, saddler, and, in rear by a stone building, covered with tin, occupied by the assured as a store, stable and coach-house, and by a yard., in which yard there was being erected a first class store, which would communicate with the building insured*; (*carpenters allowed to be at work for one month.*)

Plaintiff alleged, that, on the 27th July, 1850, there were, in said building, goods to the full amount insured, and that, on the same day, said building was destroyed by fire, and Plaintiff sustained a loss to the amount of £449 10s 8d. Plaintiff concluded for the sum of £475, with interest.

To this action Defendants pleaded, that the house and premises, wherein the goods were, were fraudulently described and represented by Plaintiff as bounded in rear by a stone building covered with tin, and occupied by Plaintiff as a store, stable and coach-house, whereas the said house wherein were contained the said goods, was bounded in rear by a stone store covered with wood, in which the fire originated, and communicated from said store to said house, by means of a door or communication between the said last mentioned store and said house, which said door or communication was omitted to be mentioned by Plaintiff to Defendants; that Plaintiff was allowed to have carpenters at works for one month, to wit, up to the first day of July then next, but that Plaintiff, long after the first day of July, and up to and at the time of said fire, had carpenters engaged at work in and about the said house and premises, wherein the goods, so insured as aforesaid were; by means whereof his insurance became void.

Under the new Jury law (1) it became the duty of two judges to settle the questions that were to be put to the jury, upon the issues raised by the parties, and this was done by submitting the following questions:

(1) 14th and 15th Vict., ch. LXXXIX.

1° What was the value of the goods, wares and merchandize, of and belonging to Plaintiff, insured by the policy, alleged in Plaintiff's declaration, which were destroyed by the fire which occurred on the 27th July, 1850, in the building described in said policy ?

2° What is the amount of damage and loss sustained by Plaintiff on the goods, wares and merchandize insured by aforesaid policy, which were saved from said fire ?

3° Was the description given by insured of the aforesaid building, containing said goods, wares and merchandize, correct ? If not, in what particular was it incorrect ?

4° Was there, at the time of aforesaid fire, a door or aperture communicating between the stone store, given as a boundary in said policy, and another store in the yard, in the rear of said building ?

5° Was the fire communicated from one of said stores to the other, through this door or aperture ?

6° Did this door or aperture alter or increase the risk in said policy contained ?

7° Was the store, in progress of erection at the time said policy was subscribed, finished and completed at the time said fire took place ? Or, were carpenters employed at work in the building containing the above mentioned property insured, at the time said fire took place ?

At the trial, the following facts were proved :

There was a brick store extending from the house insured to the stone hangar, at the extremity of the yard. This brick store was covered with shingles ; there was a communication door from the house in Fabrique street for this store, both from the ground flat and second flat. There was a communication door between this store and stone hangar, in the lower flat. The carpenters had been at work the day of the fire, at the new building in the yard, which was in course of erection. The new store in progress of erection, in the yard, was constructed of brick. The last day that a carpenter had been at work on these premises was on the day previous to the fire, he put up some trimmings to the inside part of the door, these trimmings were made in the stone hangar. The carpenter's work, with the exception of this, had been finished three weeks before. The trimmings were three boards, one at each side of the door, and one at the top, which is called the lining, which were nailed up, and was a work of about fifteen minutes, these are the boards which were made at the stone hangar below. The house communicated with a brick store, covered with shingles, and this brick store communicated again with a stone store covered with tin. Communication doors between different buildings form an essential ingredient in estimating

premium of insurances on buildings, and do, of course, increase the risk. Stables are considered as additional risks, and an additional premium is charged for them, and the circumstance of a stable communicating with a dwelling house does decidedly create an additional risk. The fire in question originated in the stone hangar."

DUVAL, J. charged the jury, and they returned the following verdict:

1° "The value of the goods and merchandize belonging to Plaintiff, destroyed by the fire in question, is of £382 16s 4d currency, from which sum must be deducted £20, leaving £362 16s 4d currency.

2° The amount of the loss sustained by Plaintiff is £61 14s 3d currency, and £5 costs, incurred in the valuation of the said goods.

3° Yes.

4° Yes; there was a door, as mentioned in this question.

5° The fire originated in the brick building in the rear, adjoining the stone hangar, and we are of opinion that the fire communicated from one of the said hangars to the other by the door above mentioned.

6° The door increased the risk as stipulated in said policy of insurance.

7° The said hangar was not complete and finished when the fire that destroyed the goods, on the 27th July, 1850, took place; there were no carpenters employed in the building where the goods were, when the fire broke out."

The difficulty presented by this verdict was, the apparent contradiction between the 3d answer and the 4th and 6th answers.

Here follow there marks of the judges of the Superior Court.

BOWEN, C. J.: There is an apparent contradiction in the verdict, upon which we must put a reasonable interpretation. There is no doubt that the brick building, covered with shingles, omitted in the policy of insurance, increased the risk; and the jury have said so. It is true that, in a portion of their verdict, the jury have said that the description in the policy of insurance was correct, but when they enter into particulars, they state quite the contrary. By reason of this omission, judgment must go for the Defendants.

DUVAL, J.: At the trial of this cause, we had some difficulty in obtaining an accurate description of the premises in which were the goods insured, but, as soon as a correct description was given, I entertained no doubt as to the result of the trial.

It will be admitted that the insured must give an accurate description of the construction of the premises and goods to

be insured, that he must communicate all facts that are material to the risk, and which are not known, or presumed to be known to the insurers Applying this rule to the present case, I say it is impossible for any person who has read the evidence attentively not to see that the insured omitted to make known to the insurers a fact which greatly increased the risk, and that by reason of this omission the Defendants are not bound to pay the loss sustained by the Plaintiff by the fire which took place on the 27th July, 1850.

It is pretended that the jury have not found this fact. I say they have, and that expressly. The 4th question submitted to them is in the following words : " Was there, at the time of the aforesaid fire, a door or aperture communicating between the stone store, given as a boundary in the said policy, and another store in the yard, in the rear of the said building ?" Their answer is, " Yes ; there was a door as mentioned in this question." Have not the insurers, this day, the right of referring to the policy of insurance, and of saying, the insured did not make known to us this essential fact, which the jurors have said increased the risk we assumed ? But the Plaintiff tells us this finding is inconsistent with the answer given to the 3d question. If it were so, I do not understand on what ground the Plaintiff can demand that judgment be pronounced in his favor. He must come before us with a clear case ; he must prove the truth of his own allegations, and, if the answers given by the jurors are inconsistent, this, in my opinion, would afford a conclusive argument against the motion of the Plaintiff for a judgment against the Defendants.

But I do not find any such inconsistency in the answer of the jurors. With a view to a right understanding of the answer given, we must bear in mind that several questions were put to the jurors at the same time. It was quite reasonable for them to expect that all the answers being read, the one should be received as explanatory of the other. When, therefore, the 3d question was put to them, they did not make mention of the door, because they knew that this particular fact was to be stated in answer to the fourth question. Indeed, they could not have made mention of the door in answering the 3d question ; because this latter question refers to the building containing the goods insured, and the *door* of which they make mention in their answer to the 4th question, is one *communicating between the stone store and another store in the yard.* It is only by confounding the dwelling house in the front with the two stores in the rear that any argument is afforded for this alleged inconsistency ; but an attentive reading of the answers to the two questions must satisfy any disinterested person that there is neither inconsistency nor contradiction in the finding.

Under these circumstances, it appears to me now, as it did at the trial, that the Plaintiff has no claim against the insurers, and, I will add, equally plain, that, if the verdict is as represented by Plaintiff, then no judgment can be pronounced in his favor.

MEREDITH, J.: A party insuring moveables is bound not only to give a true description of the building containing the property insured, but also to disclose all material facts known to him, and of which the insurers may be presumed to be ignorant. By material facts, in this respect, are meant all those which, if communicated to the insurer, would induce him, either to refuse the insurance altogether, or not to accept it unless at a higher rate of premium (1). Alauzet says: " Les déclarations ne doivent pas comprendre seulement la " désignation exacte de la chose assurée, mais encore les " circonstances étrangères de nature à modifier l'opinion des " risques." (2)

The jury, in the present case, notwithstanding it has been established in evidence, that there was a brick building covered with wood, between the building containing the goods insured, and the stone store covered with tin, given as a boundary in the policy, and contrary to the judge's charge, have found that the description given of the building containing the goods, was correct.

It does appear to me that the jury, in considering the third question submitted to them, have attached too restricted a meaning to the words " description of the building;" but, be this as it may, I think their finding is binding upon us. The jury have however also found that there was a door communicating between the stone store covered with tin, given as a boundary, and another store " *in the yard, in rear of the said building,*" by which words, in the question, I understand, " in the yard in the rear of the building containing the goods insured."

The jury have thus, it appears to me, indirectly found that, although the building containing the goods insured, was correctly described, yet there was in the yard, in the rear of that building, another store, which, it is important to observe, was not *mentioned in the policy*; and they have found directly, that there was a door communicating between the stone store mentioned in the policy, and the store not mentioned in the policy; and that this fact, which, it is also to be observed, was not disclosed to the insurers, increased the risk contained in the policy.

(1) 1 Arnould, p. 540. (Edition of 1850.)

(2) 2 Alauzet, p. 414; Boudousquié, p. 79, n° 51; Quenault, p. 140, n° 174.

The facts, which the Plaintiff thus failed to disclose, must have been known to him, and cannot be supposed to have been known to the Defendants; and, as the jury have found that the communications from the one store to the other increased the risk, it is to be presumed that, had that fact been disclosed, a higher premium would have been exacted.

I therefore think that there has been, in this instance, a concealment of a material fact, sufficient to vitiate the policy. There is no reason whatever to suppose that this concealment was intentional on the part of the Plaintiff: but this in law is unimportant. The consequences are the same, whether the suppression of the truth arise *from fraud*, or merely from negligence, mistake or accident (1). The law of France and the law of England agree on this point (2).

Had the fact been established by the verdict, that *between* the building containing the goods insured, and the store mentioned in the policy as *a boundary*, there was a brick building *covered with wood*, I would not have felt any hesitation as to the judgment to be pronounced: as it is, although the case, in the shape in which it has come before us, is not free from difficulty, it appears to me, after much consideration, that, for the reasons already mentioned, we cannot maintain the Plaintiff's action.

The motion of the Plaintiff for judgment, pursuant to this verdict, is overruled, and the judgment is in favor of the Defendants, as follows:

The court considering that, by the verdict in this cause rendered, it is established that, at the time the building mentioned in the policy of insurance, alleged and in part recited in the declaration in this cause, as containing the goods, wares and merchandizes insured by Plaintiff, was destroyed by fire, there was a door communicating between the stone store given as a boundary in the said policy, and another store in the yard in rear of the above mentioned building, which fact was not disclosed to Defendants by Plaintiff; considering that, by said verdict, it is further established, that the said door increased the risk in the said policy stipulated, and that by reason thereof said policy is void; considering also that the policy described the house containing the goods insured as bounded by a yard at the extremity of which was a stone hangar covered with tin, whereas the evidence established that between the stone hangar and the house there was a brick building covered with wood, communicating with both, of the existence

(1) 1 Arnoult, pp. 540. 541.

(2) Grun & Joliat, p. 261, n° 210; 2 Alauzet, p. 425, n° 494. Ed. of 1844; 1 Phillips, p. 214, Ed. of 1850; Hammond, p. 66; Quenault, p. 141.

of which building no mention was made in the policy, doth dismiss the action of Plaintiff.

From this judgment the Plaintiff appealed, and obtained a reversal of the same. The following remarks of the Judges will show the ground of this reversal.

MONDELET, C., Justice : I have, after much and very serious reflection, satisfied my mind, that Plaintiff was entitled to what he has been refused, that is to say, a judgment on the finding of the jury, for the sum he prayed for in his motion. I hold the finding of the jury, to be a verdict, not a general verdict, as heretofore, but a special one, that is, a new mode, a series of special answers to special questions, which has not wrested from the jury their right to decide upon the fact, such verdict is not the special verdict exactly as known, understood and carried out in England, it is a *modus operandi sui generis* here, which the Legislature, by means of one word, *special*, has introduced into the doings of the Jury, without destroying its essential attribute, right and power, as a jury. The jury answer questions which the law has thrown upon the judges the difficult, cumbrous and responsible duty of shaping. in this case, the jury having affirmed as to the description being correct, and negatived as to the fire having communicated through a door which so much as been said about, can we not reconcile these answers with that which, *in the abstract*, bears upon the increase of the risk resulting from the door (which of course, must be the case), by saying, that this want of mention of the door, in the policy, cannot and ought not to avail the insurers, inasmuch as it does not appear fraudulently to have been concealed, but merely not mentioned. It is my opinion we are justified and safe in so doing, and for that reason I should give the Plaintiff his Insurance.

Were the above considered as not strictly true, and conclusive, I would call to my assistance another consideration, which is, that the jury have *evidently* joined in favor of the Plaintiff, in the court below. Whatever irregularity there may have been in some of the proceedings, it is not the less certain that the opinion of the jury was in favor of the Plaintiff, and this they have, by their verdict, unanimously recorded.

I feel that an objection is at hand ; the jury have not determined the question of fraud and concealment, which was a part of the Defendant's plea or *exception*.

This is true to a certain extent, unless it be said, that having awarded a certain amount as his just claim against the Defendant's the jury have decided there was no *fraud*.

But granting, as I am free to do it, that this is not a satisfactory answer, and that, at the time the *articulation de fait*

was regulated by the judges, and at the trial, the question of fraud and concealment was lost sight of, not taken into account, and that the jury did not find upon that, because no questions were put to them in regard to that, what is the consequence ?

To arrive at a satisfactory result, I think it suffices for one to reflect a little, and finding that the Defendants, after the *articulation de fait* had been arranged, the trial had, and no motion made to set the verdict aside, and for a new trial, that the Defendants are doubly to be shut out of any advantage that might avail them otherwise 1st. They have virtually assented to all that ; 2d. They may fairly be presumed to have either abandoned, or not have been desirous of insisting on that part of their case, I mean fraud and concealment. Then they have completed what was incomplete, regularized what was irregular, and covered, as often is done, nullities which had they in due time availed themselves of, would very probably have been fatal to the Plaintiff: these reasons have led me to the conclusion that: 1° The Plaintiff should have had judgment on the verdict; 2° That the court below was wrong in not giving him judgment; 3° That the judgment is wrong, the court having dismissed the action, contrary to the verdict of the jury; 4° That, in the absence of a motion to that effect, it ought not to have dismissed the action ; 5° That we should not confine ourselves to say to Plaintiff that he cannot appear to have been wrong in the opinion of the jury, but that the judgment should be a confirmation of the finding of the jury, or rather, the carrying out of the verdict of the jury.

ROLLAND, Justice: The action is founded upon a Policy of Insurance, which must be carried out in good faith, according to the law of the land, which, in this particular, is the law of France, although the English rules of evidence are to be applied to this cause. This is a *contrat aléatoire*, and it must be carried out in good faith. The Defendants have pleaded *dol* and fraud, to wit: a fraudulent concealment in the description of the premises insured, by not mentioning the existence of a door, as appears by the pleadings. This plea was good, if made out. In England, this omission by itself might have been fatal, but, in our system, it required proof of deception and fraud, and a further proof that, by this door, the fire had extended, and that it had increased the loss. If the doctrine contended for by the Respondents were maintained, no assured would be safe ; one might pay premiums for years, and, if a fire occured, he would be met by a plea setting out all manner of trivial discrepancies in the description.

The question was not put to the jury whether there had been a fraudulent concealment or deception in the description:

and there is not a word of proof to that effect. Quite the contrary, it does appear that the description was prepared by the agent of the Respondents.

Therefore, the court are unanimous in reversing the judgment, three of the judges are for giving a judgment in favor of the Plaintiff, Mr. Justice AYLWIN, being of opinion the case should be sent back to be tried before another jury.

PANET, Justice : I concur in the reversal of the judgment.(1)

AYLWIN, Justice : I am of opinion that the case should be sent back to the court below to be tried again before another jury, inasmuch as a material point put in issue by the pleadings, to wit : fraud and concealment in the description of the premises, has not been submitted to the jury. The judges of the court below in preparing the questions to be submitted to the jury have omitted this material fact alleged by the Respondent, so that the finding of the jury has been given irrespective of this point, and in fact the Respondents have been virtually deprived of this ground of defence.

The JUDGMENT is as follows : " The court, considering that the Respondents' plea to the action of the Appellant in the court below, was, that the house and premises wherein the goods were deposited, was falsely and fraudulently described and represented by the assured, and that a door of communication was fraudulently omitted to be mentioned, through which the fire communicated and which materially enhanced the risk ; that certain questions were put to the jury who tried the case, for them to report upon, on which the jury did return as their special verdict, that their was a door of the description above mentioned, saying, at the same time, that the fire was not communicated through it, and also that this door augmented the risk as stipulated in the policy of insurance, and, further, that the description of the building given

(1) M. Le juge PANET s'est abstenu d'émettre aucune observation lorsque ce jugement a été prononcé. Les éditeurs ont obtenu de lui les raisons de son jugement comme suit :

" J'ai acquiescé au dispositif du jugement de notre Cour, la rédaction des considérants ne me convenait pas. J'étais d'opinion que la Cour, dont le jugement nous était soumis, avait mal interprété le verdict des jurés. Ce verdict niait les faits qui servaient de base aux exceptions des Intimés. La description des bâtisses dont il s'agissait par rapport aux marchandises assurées avait été donnée currectement par l'Appelant, et le fait de l'existence d'une communication comme augmentant le risque n'était d'aucune conséquence vu que la désignation des prémisses était telle que cette porte, ou autre communication, devait exister et être connue des assureurs les Intimés. Le jugement, en renvoyant l'action de l'Appelant, interprétait le verdict des Jurés d'une manière contradictoire à lui-même : or cette contradiction n'était qu'apparente, car le verdict établissait que la description donnée par l'assuré était correcte, par conséquent, non frauduleuse ; ensuite le fait que l'existence d'une communication augmentait le risque, circonstance toute simple et naturelle, n'apportait aucune modification au sens de ce verdict pris dans son entier.

by the insured was correct; from which no inference can be drawn, in the opinion of this court, prejudicial to the Appellant, nor is it established or even mentioned in the said verdict, that the facts of the existence of the said door was not declared, much less, that it was fraudulently suppressed as stated in the Respondents' plea; considering that the material allegations of the fire and loss of the Appellant being established, it was incumbent on the Respondents to prove the facts mentioned in their said plea as the ground thereof, and particularly the fraud and deceit on which it rests, and that it does not appear either from the questions put to the jury or from the evidence in the case that any attempt was made to prove these assertions so as to justify a return of the jury thereupon, as they were not called to make such a return; and considering that even if there was an ambiguity in the answers and verdict of the jury, which might have rendered doubtful the actual facts that were so reported for the information and judgment of the court, as the Respondents did not ask for a new trial (which they ought to have asked for, if, by some error in proceeding, or some error in expression, either of the question put to the jury, or if the answers had occurred to the prejudice of their interests), they must abide by the verdictof the jury and no other question can arise than that of ascertaining, if they the Respondents have made out their plea in evidence, and this court is of opinion that they have not: It is adjudged and ordered, that the judgment appealed from, namely, the judgment by the Superior Court at Quebec, rendered on the thirteenth day of January, 1852, be, and the same is hereby reversed.

And the majority of the court, *dissentiente* the Honorable Mr. Justice AYLWIN, giving the judgment which the court below ought to have given. It is considered that the Appellant do recover from the Respondents, on his demand in the court below, founded on the Policy of Insurance, as and for a loss by fire established by the said verdict, the sum of four hundred and twenty-nine pounds, ten shillings and seven pence half penny currency, together with interest thereon, from this day, until perfect payment. (2 *D. T. B. C.*, p. 200 et 4 *D. T. B. C.*, p. 107.)

STUART, OKILL, for Appellant.

STUART and VANNOVOUS, for Respondent.

CAPIAS.—CAUTIONNEMENT.

SUPERIOR COURT, Montreal, 9 décembre 1851.

Before DAY, VANFELSON and MONDELET, Justices.

TORRANCE et al., Plaintiffs, *vs.* GILMOUR et al., Defendants.

Jugé : Que l'obligation contractée en vertu d'un cautionnement donné au shérif sur un *cap. ad resp.*, est pour le montant porté au dos du bref, et pas davantage ; que dans l'espèce où le shérif a pris le cautionnement pour le double du montant mentionné en l'affidavit, et que le Demandeur a obtenu jugement pour une plus forte somme, l'obligation de la caution ne peut excéder le montant mentionné dans l'affidavit et endossé sur le writ de *capias;* que le transport par des shérifs conjoints sous leur signature ordinaire, et dans la forme usitée en Angleterre, est valable ; qu'une motion faite par le Défendeur à l'effet qu'il lui soit permis de donner un cautionnement spécial pour le montant mentionné en l'affidavit, et porté sur le writ, laquelle a été rejetée, n'est pas une exécution suffisante des exigences du writ, pour libérer les cautions envers le shérif. (1)

Action on bail-bound against the sureties.

The declaration alleged the arrest of one J. S. under a *cap. ad. resp.*, issued at the suit of Plaintiffs for £137 10s., the sum endorsed on the writ ; his indebtedness in the sum of £237 10s. ; that the Defendants became bail to the sheriff for his appearance on the return of the writ ; the neglect of J. S. to appear on the return day, and the rendering of a judgment against him for £237 10s. ; to wit, £137 10s., amount of a draft, and £100, for monies had and received by him as agent of Plaintiffs ; also, the assignment of the bail-bond by the sheriff to Plaintiffs ; and concluded for the sum of £275, being less than the amount of Plaintiff's debt, interest and costs in said suit.

The condition of the bail-bound, which was for £275, double the amount of the debt sworn to, was "that, if the above bounden J. S. does appear before the Queen, in Her Court of Queen's Bench at Montreal, on Monday, the second day of October next, at ten of the clock in the forenoon, to answer the Plaintiffs in a plea as contained in a certain declaration to be annexed to a writ of *ca. ad. resp.* issued, &c., &c., for the sum of £137 10s., then this obligation to be void and of no force, otherwise to stand and remain in full force, vigor and effect."

The assignment, which was endorsed on the back of the bail-bond, was as follows : "Know all men, &c., that we, John Boston and William Foster Coffin, Esquires, sheriff of the District of Montreal, in the Province of Canada, within named, have at the request of A and B., the Plaintiffs, also within named, assigned to them the said A. and B., the said Plaintiffs, the

(1) V. art. 828 C. P. C.

within bail-bond, pursuant to the statute in such case made and provided. In witness whereof, we have hereunto set our hand and seal of office, at the city of Montreal, the 16th day of the month of August, in the year of Our Lord, 1849.

BOSTON & COFFIN, sheriff.

We accept the foregoing assignment and transfer,

A. and B.

The Defendants set up by way of exception: 1. That, on the return day of the writ, J. S. appeared by his attorneys, and offered to give special bail for £137-10s., sworn to in the affidavit, which motion was illegally rejected by the court, and that the Defendants were therefore discharged from all liability upon the bail-bond. 2. That the assignment of the bail-bond was informal. 3. That the judgment in the cause against J. S. was for a sum different from that set forth in the affidavit to hold to bail, and that the Defendants could not be held liable to pay any sum greater than that sworn to in the affidavit and endorsed on the writ.

Plaintiffs demurred to these pleas. Issue being joined, the question of law was reserved to the final hearing.

CROSS, for Plaintiffs: It is too late for the Defendants to seek to avail themselves of informalities in the original suit which the Plaintiffs might have answered at the time. J. S's. appearance would have been a good plea, if it were shewn on the record, which it is not. The mere motion to be permitted to appear, amounts to nothing: besides, that motion was rejected, for what reason it does not appear, it may have been for want of notice or the inobservance of some formality; nothing but the special bail-bond, or the surrender of the debtor, can be considered sufficient evidence of compliance with the writ. The assignment of the bailbond is in the form used in the courts in England, and if no provincial statute exists authorizing an assignment, the mention of the word "statute" does not vitiate the instrument. As to the liability of the Defendants to pay the entire sum for which judgment was rendered, the object of the statute 5 Geo. IV, ch. II, is to have the Defendant or his bail: the words are, "that the bail "shall not become liable unless the Defendant shall leave this "province without having paid the debt, interest and costs, "for which the action shall have been brought:" here the debt is the amount for which judgment has been recovered, and the Defendant not having surrendered, that is the amount for which the bail must be held liable. Such is the rule in England. The sheriff has received the bond as a trustee for the Plaintiffs, and it stands good for the Plaintiffs' indemnity to the full amount of their debt, and the sheriff would have been liable for that amount in case of an escape.

ROSE, for Defendants : The assignment of the bail-bond is null and void, and confers no right on the Plaintiffs. It should have been signed and sealed by both sheriffs, and should have contained a formal subrogation. The words " have assigned the within bail-bond " seem to refer to some separate instrument, and amount to no more than a certificate that an assignment had been previously made, the terms of which do not appear : as none is shewn, it is to be inferred from the language, that the assignment, if it ever existed, was separate from this certificate. The Defendant J. S. dit appear, and moved to put in bail for the amount sworn to, which is all that the statute requires, and the utmost his sureties are bound for. This is shewn by the Plaintiffs' own proceedings. The Defendants therefore have complied with the conditions of their bond and are relieved, notwithstanding that the motion was wrongfully rejected by the court. Under any circumstance, they cannot be held liable for more than the amount sworn to in the affidavit, and on payment of which J. S. would have been released at the time of his arrest.

DAY, Justice : This is an action on a bail-bond taken by the sheriff on a writ of capias issued against J. S. The amount endorsed on the bail-bond is £137 10s. J. S. was arrested and the sheriff took bail in the usual terms for double the amount of the debt, on the condition, that J. S. would appear on the return day to answer the action. When the action was returned, J. S. appeared by his attorneys and made a motion for leave to put in special bail, not in the terms of the Statute, but for the amount endorsed on the writ. This motion, in this restricted form, was rejected, and in fact no special bail was put in. The case then proceeded by default, and the Plaintiffs obtained judgment for £237 10s. and on that judgment have brought the present action, the bail-bond having been assigned. The points raised by the pleas are : 1. That the assignment of the bail-bond is not sufficient in point of form : 2. That there is no evidence of default of the debtor in the original action : That the Plaintiffs can only recover the amount endorsed on the writ. On the first point, the court holds that the assignment, which is in the usual form, is sufficient. Under our system no set form of words or special mode of proceeding is necessary ; it is enough that the instrument, signed by both parties, shews plainly what was the intention of the parties in executing it. On the second point, we are of opinion that the special bail should have been offered in the terms of the statute. The condition of the bail-bond is that J. S. should appear, and not doing so, his bail become liable. There is no evidence of the Defendant's appearance in the original action apart from the motion to put in bail, and in the absence of the

reasons for the rejection of that motion, we have the substantial fact that no special bail was put in. With respect to the third point, the court is with the Defendants. Nothing but a course of reasoning founded on fictions can lead to the conclusion that a person arrested for £137 10s., and who, by paying that sum, can obtain his release, can bind his bail for two or three times, or it might be ten times that amount. There is no analogy between our system and the system which prevails in England in this respect. We entertain no doubt that the liability of the bail is for the amount endorsed on the writ, and no more. The Defendant in the original suit could have got free by paying £137 10s., and the irresistible conclusion is that the bail cannot be held liable for a greater amount.

JUDGMENT: "Considering that the Plaintiffs have proved the material allegations of their declaration, and that by reason thereof, and by law, they are entitled to recover from the Defendants the sum of £137 10s., current money of the Province of Canada, that is to say, the amount specified and endorsed upon the writ of *capias ad respondendum* issued in the cause wherein the said Plaintiffs were Plaintiffs, and J. S., in the said declaration mentioned, was Defendant, with the interest on the said sum, and costs adjudged and taxed in the said suit, and no more; and considering that the Plaintiffs ought not, by reason of any thing contained in the exceptions of the Defendants, or either of them, in this cause filed, or by them established, to be prevented from recovering the said sums of money, dismissing the said exceptions, doth adjudge and condemn the Defendants, jointly and severally, to pay to the Plaintiffs the sum of £161 11s. [being the £137 10s., with interest and costs in the previous action] for the payment of which the said Defendants, by reason of the bail-bond in the said declaration set forth, executed by the Defendants to and in favor of the sheriff of this district, on the 27th July, 1848, and duly assigned to the Plaintiffs, and of the proceedings in the said cause had and taken, and by law, became and are liable to pay to the Plaintiffs, the whole with interest and costs. (2 *D. T. B. C.*, p. 231.)

CROSS and TORRANCE, for Plaintiffs.

ROSE and MONK, for Defendants.

The following are the authorities cited by the Plaintiff's Counsel as to the extent of the liability of the sheriff's bail:

8 T. R., p. 28, *Stevenson* vs. *Cameron*; 7 T. R., p. 370; 1 H. B. Rep., p. 233 and p. 76; 3 East, p. 604; 3 Petersd. Abridgt., p. 95, v. Bail; Impey's Office of sheriff, p. 100; Statute 5 Geo. IV, ch. II, s. 1, p. 135; Rev. Statutes: 12 Vict. ch. XLII, sec. 13 and 14; Watson's Office of sheriff, p. 369; Chitty's Prac., vol. III, p. 388.

ENQUETE.—COMMISSION ROGATOIRE.

SUPERIOR COURT, Montreal, 14 avril 1852.

Before DAY, SMITH and MONDELET, Justices.

MACFARLANE *vs.* BRESLER.

Le Défendeur ne peut être contraint de procéder à son enquête avant le rapport d'une commission rogatoire émanée sur la demande du Demandeur.

A *commission rogatoire* had been ordered, on motion of Plaintiff, to examine certain witnesses in the State of New-York, the Defendant refused to join in the commission. Plaintiff closed his *enquête*, reserving to himself the right to file the return to this commission thereafter, and required the Defendant to proceed with his *enquête*, and, on his failing to do so, had him foreclosed.

Defendant moved for a revision of this order, on the ground that, in the absence of the return to the *com. rog.* he had had no opportunity of seeing or becoming acquainted with part of the evidence of Plaintiff, and was ignorant what evidence it might be necessary for him to adduce, in contradiction of such evidence of Plaintiff.

DAY, Justice: A practice had prevailed to this effect. As the question, however, now comes up, we are prepared to say that such a practice cannot be supported. It is contrary to common sense that, when a *commission rogatoire* has not been returned, and Defendant consequently cannot know what evidence he has to meet, he shall be forced on with his *enquête*. We are, therefore, of opinion that the ruling at the *enquête* was wrong, and the order must be reversed. Motion granted. (2 *D. T. B. C.*, p. 238.)

BETHUNE and DUNKIN, for Plaintiff.

BIDWELL and KERR, for Defendant.

TIERS DETENTEUR.—ACTION HYPOTHECAIRE.

COUR SUPÉRIEURE, Trois-Rivières, 24 février 1852.

Présents: MONDELET, VANFELSON et MEREDITH, Juges.

BANQUE DU PEUPLE *vs.* GINGRAS.

L'on ne présume jamais que le tiers détenteur s'oblige personnellement.

La demande est pour £220 16s. 10d., montant d'une obliga-

tion consentie par Modeste Richer à Pierre Eustache Dostaler, et transportée par ce dernier à la Banque du Peuple. L'obligation contient une hypothèque spéciale sur une propriété dont le Défendeur a fait l'acquisition.

DUMOULIN, pour les Demandeurs, sollicite une condamnation personnelle contre le Défendeur.

TURCOTTE, C. R. pour le Défendeur, qui a répondu par une défense au fonds en droit, prétend que l'action devrait prendre la forme hypothécaire. (1)

MONDELET, juge: La déclaration allègue, que, par offres et protêt du 15 novembre 1850, le Défendeur a fait offre de payer la créance de la Banque, *comme étant le détenteur et propriétaire* d'une partie des biens hypothéqués; que, par acte en date du 12 avril 1851, la Banque a signifié au Défendeur sa créance et son droit d'hypothèque, lui déclarant que, comme *détenteur* de la propriété hypothéquée, il a, *pour se libérer de son hypothèque*, fait les offres ci-dessus, que la banque a alors refusées; que, maintenant, la banque est prête à accepter ces offres, et requiert le Défendeur de payer sous vingt-quatre heures, à quoi le Défendeur a répondu qu'il persistait dans ses offres; que, par lettre missive, datée à Yamachiche, le 21 mai 1851, le Défendeur a *renouvelé* sa promesse de payer à la banque, le montant de l'obligation en question, et a de fait payé une partie de la somme due, " et qu'il redoit à la banque, *pour et au moyen des causes ci-dessus mentionnées*, une balance de £220 16 0, laquelle somme le Défendeur a reconnu devoir *légitimement*, et doit être condamné à la payer aux Demandeurs."

De tous ces allégués, il ne résulte ni une demande ni une promesse personnelle ; au contraire, c'est au détenteur que s'adresse la demande, et c'est en cette qualité qu'il y répond. Comme tel, il peut se libérer de la créance par le délaissement. Il ne paraît pas qu'il ait renoncé au bénéfice de ce moyen, et nous ne devons pas présumer une telle renonciation."

La conclusion des Demandeurs ne découle donc pas des prémisses, d'où il ne peut résulter que le droit de s'en prendre au Défendeur comme détenteur par action hypothécaire.

L'on ne *présumera* jamais qu'un tiers détenteur s'oblige personnellement, et renonce au droit de délaisser, à moins que la promesse ne soit expresse et la renonciation formelle. Cette doctrine est celle de Loyseau et de Pothier, (2) reproduite par les autorités citées au Barreau.

(1) 11 Duranton, Tit. 18, p. 149, et suiv ; 2 Nouveau Pigeau, p. 481

(2) Loyseau, *du Déguerpissement*, liv. IV, ch. IV, n.os 15 et 16 ; Pothier, *Hyp.*, édit. in 4°, p. 444.

MEREDITH, juge, exprima qu'il concourait dans la décision : jugement déboutant l'action. (2 *D. T. B. C.*, p. 243.)

DUMOULIN et DE NIVERVILLE, pour les Demandeurs.

TURCOTTE, C. R. pour le Défendeur.

CAUTIONNEMENT.

COUR SUPÉRIEURE, Montréal, 23 mars 1852.

Présents : DAY et SMITH, Juges.

BANQUE de la CITÉ *vs.* BROWN et al.

Jugé : Que le cautionnement pour l'exécution des devoirs d'un officier de banque, est mis au néant par la réduction du salaire stipulé, en faveur de cet officier, dans l'acte qui contenait tel cautionnement, et que cette réduction de salaire sans la participation des cautions a l'effet d'une novation.

Les Demandeurs, par acte authentique, avaient engagé le Défendeur, F. Brown, comme *paying teller*, à raison de £300 par an. A cet acte, les Défendeurs Lyman et Perkins, C. J. Brown, et un nommé Tobin, intervinrent, et se reconnurent obligés envers la banque au paiement d'une somme de £2000, pour sûreté de l'exécution fidèle des devoirs du dit F. Brown, en sa qualité de *paying teller*.

Cet engagement était daté du 4 octobre 1847.

Le 13 juin 1849, F. Brown quitta le service de la banque, et se trouva redevable à cette institution d'une somme de £246 5s. 0d., qui lui était restée entre les mains des deniers appartenant à la banque, et qui lui avait été confiée comme *paying teller*, dont il n'avait pas rendu compte, et qu'il avait gardée par devers lui.

Sur ces faits, les Demandeurs concluaient solidairement contre Brown, et les trois autres Défendeurs, les cautions, au remboursement de cette somme.

A cette demande, Lyman et Perkins plaidèrent séparément les mêmes moyens de défense. Ils niaient d'abord le déficit en question, ainsi que l'avait fait Brown, et opposaient, par exception, que, lors de l'engagement et du cautionnement en question, les Demandeurs payaient les services de Brown à raison de £300 ; que ce salaire fut stipulé au dit acte, et que, sans cette stipulation, les cautions n'auraient pas signé le cautionnement, et qu'ils auraient considéré le risque de cautionner trop considérable si le salaire eut été moindre ; que le 21 septembre 1848, les Demandeurs notifièrent Brown qu'ils ne l'emploieraient pas davantage au même salaire, mais offrirent de le continuer dans les mêmes fonctions, à raison de £225 par an, à compter du 1er décembre suivant, offre que Brown accepta ;

le tout à l'insu des cautions ; que, par là, il était intervenu entre les Demandeurs et Brown, un contrat nouveau et différent, et par lequel la position des cautions se trouvait empirée, et qu'à compter du 1er décembre 1848, le cautionnement et engagement du 4 octobre 1847, se trouvait innové, et remplacé par le dernier engagement et que Brown ne devait aucune somme au 1er décembre 1848, assurée par leur cautionnement, et qu'ils ne pouvaient être responsables des défalcations survenues depuis cette époque.

Les Demandeurs, en réponse, nièrent la novation des contrats, et invoquaient contre les cautions le fait que l'un était directeur et l'autre actionnaire de la banque, et en induisait la conclusion qu'ils connaissaient la réduction du salaire de Brown, qu'ils y asquiesçaient, ainsi qu'à la continuation de leur cautionnement.

La cour maintint l'exception des cautions, en observant qu'il n'est pas permis de déroger aux conditions de semblables conventions sans le consentement formel de toutes les parties. Le juge DAY, qui prononça le jugement, cita au soutien de la décision : Répertoire de Merlin, *verbo* novation, pp. 633-5-6.

JUGEMENT : "The court, proceeding to adjudge upon the "issues raised between the Plaintiffs and said Defendants, "Wm. Lyman, John A. Perkins and Christian Julius Brown, "sureties of said Francis Brown, considering that said Lyman, "Perkins and C. J. Brown were parties to the said bond and "agreement,. and, as such, therein and thereby, became the "sureties of said Francis Brown, as in the said declaration is "alleged, and that said Plaintiffs and said Francis Brown did, "afterwards, by mutual agreement, on the 21st September, "1848, without the intervention or consent of said Lyman, "Perkins and C. J. Brown, change certain of the terms and "stipulations in the said bond and agreement contained, by "agreeing upon and substituting the sum of £225, as the "yearly salary of said Francis Brown, for and in the place of "the sum of £300, as stipulated in the said bond and agree-"ment, and that, by reason of such change and new agree-"ment, and by law, said Lyman, Perkins and C. J. Brown "were and are discharged and released from all liability, for "or by reason of any debt, defalcation, matter or thing by "him incurred, made or done after the time of said change "and new agreement, doth dismiss the action of said Plaintiffs, "in so far as said Lyman, Perkins and C. J. Brown, are con-"cerned." (2 *D. T. B. C.*, p. 246.)

ROSE et MONK, pour les Demandeurs.

MACKAY et AUSTIN, pour Perkins.

MACK et MUIR, pour les autres Défendeurs.

CAUTIONNEMENT.—CHOSE JUGEE.

SUPERIOR COURT, Quebec, 7 avril 1852.

Before DUVAL and MEREDITH, Justices.

BRUSH et al. *vs.* WILSON et al.

Jugé : Qu'un jugement rendu contre un débiteur principal sur une contestation élevée par lui, a force de chose jugée contre la caution, qui n'était pas partie à l'action originaire. (1)

Plaintiffs brought their action against Defendants for the sum of £3000, under the following circumstances. On the 6th of September, 1844, Plaintiffs had agreed to construct a steam engine for John Ryan ; the price to be £6000. For the payment of the balance due upon this sum, to wit, £3000, Ryan had procured two *cautions solidaires*, Andrew Watson and Thomas White, and four *certificateurs de cautions*, Wilson, Patterson, Connolly and White, the Defendants in this cause.

Plaintiffs alleged, in their declaration, that they had impleaded Ryan, their principal debtor, and Andrew Watson and Thomas White, as *cautions*, and obtained judgment against them, which judgment remained unpaid and unsatisfied. They also alleged the insolvency of Ryan and his sureties, and now brought their action against the *certificateurs de cautions*.

Defendants pleaded that the work had been badly done ; to which Plaintiffs answered that this plea had already been raised by the principal debtor, and had been dismissed, and that this judgment had the *force de chose jugée* against Defendants, the *certificateurs de cautions*.

To this answer Defendants demurred, and alleged that the judgment invoked by Plaintiffs was not rendered against them, nor were Defendants parties in any manner to the suit or action wherein said judgment had been rendered, and that the same had not the effect of *res judicata* against Defendants, but were wholly *res inter alios acta*.

The court maintained the special answer of Plaintiffs, and dismissed the demurrer. In rendering judgment, DUVAL, Justice, observed : There is a distinction to be made, which is, that, if the matter pleaded by the *caution*, is peculiar and personal to the *caution*, the plea is good, but if it has been pleaded by the principal debtor, the judgment rendered thereupon has the *force de chose jugée* against the *cautions*.(1)

(1) V. art. 1241 C. C.

(1) Pothier, *Oblig.*, n° 908.

JUDGMENT: " The court considering that the allegations in the special answer contained, are sufficient in law, if proved, to enable Plaintiffs to have and obtain the conclusions by them in their said special answer taken, and more particularly that the judgment mentioned and set forth by Plaintiffs in the said special answer, has the *force de chose jugée* against Defendants, doth dismiss the said demeurrer. (2 *D. T. B. C.*, p. 249.)

STUART and VANNOVOUS, for Plaintiffs.

ROSS and MCCORD, for Defendants.

PROCEDURE.—ENQUETE.

SUPERIOR COURT, Quebec, 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

BRUSH et al. *vs.* WILSON et al.

Jugé : Que s'il y a plusieurs contestations, telles qu'une exception à la demande, et une réponse spéciale à telle exception, et une inscription générale aux enquêtes pour production de la preuve, quoique la réponse spéciale, alléguant *chose jugée* quant aux moyens contenus en l'exception, si elle était prouvée, serait une fin de non recevoir quant à telle exception, un seul juge en chambre n'a pas le pouvoir de restreindre la preuve à la réponse spéciale, et qu'il n'y a que la cour qui puisse ainsi restreindre la preuve.

La déclaration, les plaidoyers et les réponses sont résumés à la cause précédente, rapportés à la page 163.

Issue being joined, as well upon the exception of Defendants *that the work had been badly done,* as upon the special answer of Plaintiffs *that this point had already been decided with the principal debtor, and that this decision had the force* de chose jugée *as against Defendants,* Plaintiffs inscribed the cause generally for the adduction of proof upon the issues raised and perfected between the parties.

Plaintiffs having made proof upon their special answer, Defendants brought witnesses to prove their plea *that the work had been badly done,* to which Plaintiffs objected, upon the ground that they were entitled to have a decision in the first instance, upon their plea of *chose jugée,* which would be a bar to any further proceedings, if maintained. The point was submitted in chambers to the presiding judge at *enquêtes,* Mr. Justice DUVAL, who decided that the inscription being general, he had no right to restrict the proof to one of the pleas, although it were desirable to do so; but that he alone had no jurisdiction to order that the proof should be restricted to the plea of *chose jugée.*

This decision was then carried before the whole Bench, for revision, and there maintained, upon the ground that a single judge, presiding at *enquêtes*, has no power and no jurisdiction to restrict the proof to one of several issues, and that this can only be done by the court on special application. The court intimated that, in this particular case, such an application might be granted.

BOWEN, Chief Justice, differed from the majority of the court, and thought that one judge in chamber had the right to order that the proof should be in the first instance restricted to the plea of *chose jugée*, which plea the court had by a previous judgment declared to be well founded.

MEREDITH, Justice : What Plaintiffs say, is, in effect, this : If we have proved our special answer, as we contend we have ; then the truth of the allegations of Defendant's exception, becomes utterly immaterial ; and, we, therefore, want the court to hear and determine the issue upon the special answer, before the adduction of evidence on Defendant's peremptory exception.

The order required from the judge at *enquête*, was, in effect, an order that the one issue should be proceeded upon, heard and determined before the other, and this although the case had been inscribed by Plaintiffs themselves for the adduction of evidence on all the issues ; and although in the event of the court being against Plaintiffs, as to the sufficiency of the proof adduced in support of the special exception, a second *enquête*, and a second hearing, would be necessary on the issue raised upon the peremptory exception.

Now although a Judge at *enquête* has full power to regulate every thing connected with the *enquête*, yet he is bound by the issues joined between the parties, and has no power to make any order respecting the hearing of the cause, or any other proceeding subsequent to the *enquête*. For these reasons the majority of the court are of opinion, that if the order required can be made, and we do not say that it cannot, it ought to come from the court, and not from a Judge at *enquête*, and we therefore confirm the judgment appealed from.

Adopting the suggestion of the court, Plaintiffs then applied to the court for an order restricting, in the first instance the evidence to the plea of *chose jugée*, which was granted. (4 *D. T. B. C.*, p. 454.)

STUART and VANNOVOUS, for Plaintiffs.

ROSS, D. for Defendants.

EXECUTION.—APPEL.

SUPERIOR COURT, Quebec, 15 décembre 1856.

Before BOWEN, Chief Justice, MORIN and BADGLEY, Justices.

BRUSH et al., Plaintiffs, *vs.* WILSON et al., Defendants.

Jugé: **Qu'on ne peut prendre exécution sur un jugement rendu contre quatre Défendeurs, si l'un d'eux a interjeté appel de ce jugement, et si cet appel est encore pendant.**

On the ninth day of April, 1855, Plaintiffs recovered judgment against John Wilson, William Paterson, Michael Connolly and Michael White for the sum of £1000 each, with interest. From this judgment, John Wilson, one of the Defendants, instituted an appeal to the Court of Queen's Bench, appeal side ; the other Defendants did not appeal. On the 25th of July, 1856, while Wilson's appeal was still pending, Plaintiffs sued out a writ of execution against William Paterson, who, by an opposition *à fin d'annuler*, contended that this execution had been illegally issued, on the following grounds: Because there is no judgment now of record in this court in the suit between the parties above named, to which it can give effect by execution or otherwise, this court having been divested of all jurisdiction, in such suit, all the papers and documents, and in fact the whole record being under the exclusive control of the Court of Queen's Bench, to which an appeal has been instituted from the said judgment, and in which appeal, William Paterson has an interest; because, by the judgment to be rendered by the Court of Queen's Bench, the judgment of this honorable court, upon which the said execution purports to have issued, may be altogether altered, and set aside, and, in that case, the monies to be levied under said writ, before the termination of said appeal, will be illegally levied, if said writ be executed ; because, if said judgment be revised, the extent of liability of said William Paterson, under the same, may be diminished, or such liability altogether removed ;

JUDGMENT: The court seeing that the record and proceedings in this cause had are now before the Court of Queen's Bench, upon the appeal instituted by John Wilson, one of the Defendants, against the judgment rendered in this cause, on the ninth day of April, one thousand eight hundred and fifty-five, and that the said appeal is still pending therein, and that the record was not in the possession of this court, when the writ of *fieri facias* or execution issued therefrom against the goods and chattels, lands and tenements of the above

named William Paterson, one of the Defendants, doth, therefore, maintain the opposition *à fin d'annuler* of the said William Paterson. (6 *D. T. B. C.*, p. 39.)

G. O. STUART, for Opposant.

STUART and VANNOVOUS, for Plaintiffs.

OPPOSITION A FIN D'ANNULER.—ACTION PAULIENNE.

COUR SUPÉRIEURE, Québec, 14 avril 1852.

Présents : BOWEN, Juge en Chef, et MEREDITH, Juge.

A. MIGNIER, Demandeur, *vs.* P. MIGNIER, Défendeur, et P. MIGNIER, ès qualités, Opposant.

Jugé: Que la nullité d'actes, invoquée dans une opposition à fin d'annuler, ne peut être demandée, à moins que toutes les parties à ces actes ne soient mises en cause; et que dans tel cas, il faut intenter l'action révocatoire ou paulienne.

L'action originaire était portée par un père contre son fils pour aliments. Le 31 janvier 1849, intervint un jugement qui condamna le Défendeur à payer au Demandeur une somme de cinquante-cinq louis, pour arrérages de rente viagère devenus dus pendant le cours de longues contestations entre les parties. En exécution de ce jugement le Demandeur fit saisir, à défaut de meubles, l'immeuble du Défendeur. A cette exécution, le Défendeur, en sa qualité de tuteur à son propre fils mineur, répondit par une opposition à fin d'annuler, alléguant que l'immeuble saisi n'appartenait point au Défendeur, mais à son fils, Joseph Mignier, représenté par lui comme tuteur, en vertu d'une donation faite au mineur par le nommé Joseph Côté, (son aïeul maternel), en date du 28 juin 1847, duement enregistrée le 12 juillet, même année.

Le Demandeur contesta cette opposition, et plaida, par exception, que le Défendeur était le seul vrai propriétaire et possesseur de l'immeuble saisi, et que l'acte de donation sur lequel cette opposition était fondée, ainsi qu'un autre acte du 8 septembre 1845, (étant une prétendue vente du même immeuble par le Défendeur au nommé Joseph Côté, son beau-père), étaient des actes faux, simulés et frauduleux, faits et exécutés par le Défendeur dans le but de soustraire ses biens à la saisie de ses créanciers, et notamment du Demandeur, le tout sans cause ni considération. Les conclusions de cette exception demandaient l'annulation de ces actes, et le renvoi de l'opposition.

A cette exception, l'Opposant répliqua spécialement qu'il était vrai que cet immeuble était passé des mains du Défen-

deur en celles du nommé Côté, par l'acte de vente cité en son exception, mais que cet immeuble était un propre appartenant à Dame Félicite Côté, épouse du Défendeur, et fille du nommé Joseph Côté, suivant un acte de donation, du 6 octobre 1832, par Joseph Côté et son épouse à Félicite Côté ; et qu'aucun créancier du Défendeur n'avait droit de faire saisir ce *propre* de l'épouse du Défendeur, et se plaindre qu'il eût été vendu par fraude, et aussi donné par fraude. Il alléguait encore, que cette vente avait été faite par forme de dation en paiement, pour satisfaire une somme de £78 qui était alors due au dit Côté et son épouse pour arrérages de rente, en vertu de la donation faite à leur fille en 1832, la dite rente fixée par un acte du mois de février 1837.

Il ajoutait encore, que la valeur de cet immeuble n'excédait pas ces arrérages de rente, et que la transaction avait eu lieu de bonne foi, et pour éviter des frais inutiles.

Le Demandeur soutenait que sa demande, commencée en août 1845, avait précédé les transactions qu'il prétendait entachées de fraude, l'acte de vente du mois de septembre 1845, et la donation du mois de juin 1847 ; que l'Opposant avait négligé de prouver la valeur de l'immeuble saisi, afin d'écarter tout soupçon quant à la transaction du mois de septembre 1845 ; qu'enfin, le Défendeur était toujours resté en possession de l'immeuble saisi ; qu'en matière de transaction entre proches, la fraude se présume.

L'Opposant soutenait, que Côté et son épouse auraient dû être parties à cette contestation, comme ayant des intérêts dans les actes dont on demandait la nullité :

JUGEMENT : " La Cour considérant que, lors de la donation faite par Côté à Mignier, fils, le 28 juin 1847, Côté était propriétaire de l'immeuble en question en cette cause, en vertu de l'acte de vente du 8 septembre 1845 ; considérant que le dit Côté n'étant pas partie en cette cause, le dit acte de vente ne peut être déclaré nul par un jugement prononcé sur une contestation liée entre le Demandeur et l'Opposant, déboute le Demandeur de sa contestation, et maintient l'opposition," &c. (2 *D. T. B. C.*, p. 251.)

LELIÈVRE et ANGERS, pour le Demandeur.

BELLEAU, pour l'Opposant.

LOI CRIMINELLE.—MACHINE.

QUEEN'S BENCH, CROWN SIDE, Quebec, janvier 1852.

Before AYLWIN, Justice.

THE QUEEN *vs.* DOGHERTY. Upon indictment for feloniously breaking, &c., a machine.

Un appareil pour la manufacture de potasse, consistant en fours, chaudrons, cuves, etc., n'est pas une machine ou engin, aux termes de l'Acte des 4 et 5e Vic., ch. XXVI, sec. 5, dont la destruction ou détérioration est une félonie. (1)

This was an indictment against Thomas Doherty, for cutting, breaking and destroying a machine for the manufacture of potash.

The indictment was framed under the 4th and 5th Victoria, cap. 26. By the 5th section of this statute, it is enacted, " That if any person shall unlawfully and maliciously cut, " break or destroy, or damage, with intent to destroy or ren- " der useless any threshing machine, or any machine or en- " gine, whether fixed or moveable, prepared for, or employed " in any manufacture whatsoever, (except the manufacture of " silk, &c., &c.,) and being convicted thereof, &c., &c., &c.,

The indictment charged the prisoner with cutting, breaking and destroying " a certain machine prepared for and employed in the manufacture of potash, of the value of £50, the property of one Ellen Ruddy." A witness having described the apparatus for manufacturing potash, mentioned in the indictment, as consisting of Ovens, Kettles, Tubs, it was made a question whether a machine, such as described by the witness, came within the meaning of the 5th section of the statute above cited.

AYLWIN, Justice: The apparatus described by the witness does not come within this meaning, for it is of the most primitive and rude character, consisting of a chimney, an Oven, and a tub; I am therefore of opinion to stop this case. A machine signifies " *any thing used to augment or regulate moving forces or powers, or it is any instrument employed to produce motion, in order to save either time or force.*" The object of the Legislature, in passing the statute upon which this indictment has been framed, was specifically to punish the destruction, by handicraftsmen and agricultural laborers, or others, of those inventions of modern science, which have superseded the accustomed manual labor of past times, more or less. (2 *D. T. B. C.*, p. 255.)

The ATTORNEY GENERAL, for the Prosecution.

POPE, for the Prisoner.

(1) V. s. 17 du ch. 168 des Statuts Revisés du Canada.

VENTE.

COURT OF QUEEN'S BENCH, Quebec, 29 juillet 1852.

Before Sir JAMES STUART, BARONET, Chief Justice, and ROLLAND & PANET, Justices.

RUSSEL et al. (Reprénant l'instance), for LOWNDES, Défendants, Appellants, and LEVEY, Plaintiff, Respondent.

Jugé: Que, dans le cas de la non-exécution d'un contrat de vente d'un objet spécifique et déterminé, détruit par force majeure, sans la faute du vendeur, et qui ne peut être remplacé, une action peut être maintenue pour la restitution des deniers payés en avance sur le contrat, mais ne peut être maintenue pour dommages résultant de la non-exécution du contrat: jugement de la Cour Supérieure, en conséquence, confirmé quant à la restitution, et infirmé quant aux dommages accordés.

The action was brought upon a contract of sale of a quantity of timber, by the buyer against the seller, in damages for non-fulfilment of the said contract, and for the recovery back of certain sums of money paid in advance, by Plaintiff to Defendant.

The declaration alleged, that, on the 12th of December, 1844, Plaintiff bargained with Defendant to buy of him 14,000 feet of merchantable birch timber, to average sixteen inches, at the rate of eight pence per foot, in full of all charges, excepting six pence for each log received, and one shilling and three pence for each log, shipping charges, said timber to be collected from the country north of Quebec, and piled on the wharves of Defendant, in St. Paul street, during the then present winter, and to be delivered as required by Plaintiff, during the then ensuing season of navigation, and payment of the purchase money agreed upon, to be made from time to time, during the then present winter, as the timber was piled ready for delivery ; that although Plaintiff paid, as required by Defendant, the sum of £488 10s. 10d., the price agreed upon, he, Defendant, refused to deliver said timber, &c., &c., to the damage of Plaintiff, &c.

To this action the Defendant pleaded, 1stly. The general issue; and 2ndly. A perpetual peremptory exception, in which, among other things, it is alleged: "That, after the "making of said agreement, to wit, between the 12th day "of December, 1844, and the 25th day of April, 1845, the "timber in said agreement mentioned, to wit, fourteen thou-"sand feet of birch timber, of the dimension, quality and de-"scription therein specified, was collected by Defendant, in "the manner and from the places in said agreement also "specified; and during the time aforesaid, was piled, as stated

" in said agreement, and for the purposes therein specified, on " the wharf of Defendant; whereof Plaintiff, had notice; and " thereupon he, Plaintiff, received said timber, and paid for " the same, as provided in and by said agreement. And Defen- " dant further saith, that, after said timber was so collected, " piled, received and paid for, and while the same remained " upon the wharves aforesaid, subject to the order and dispo- " sal of Plaintiff, to wit, on the 28th day of May, in the year " last aforesaid, said timber was casually burnt, without " neglect or default of Defendant."

PRIMROSE, for Plaintiff: The main question is as to the delivery of the timber by Defendant to Plaintiff. The pretension of Plaintiff is that no such delivery had taken place. Payments had been made in advance; a certain quantity of timber had been piled upon the wharves of Defendant: but the delivery to Plaintiff was to have been made when required, during the season of navigation. That delivery had not been required and had not been made, and consequently the sale was not complete. The timber had not been set apart, culled, marked and measured according to the contract. (1)

O. STUART, for Defendant: The timber had been collected and piled by Defendant, and received and paid for by Plaintiff, and was at the risk of the latter. The rule to be followed in this instance is laid down by Pothier, *Contrat de Vente*, n° 307, he says: " It is a principle that, as soon as the contract of sale is perfected, the thing is at the risk of the buyer, though it is not delivered to him; so that, if during this period, it happens to perish, without the seller's fault, the seller is discharged, while the buyer still remains bound to pay the price agreed upon." *Idem*, n° 308. (2)

There are, in this case, all the requisites to constitute a contract of sale, *res, pretium, consensus;* 875 pieces of birch, containing 14,000 feet, upon which receiving charges have been paid; £466 13s. 4d. as the price of the same; and the consent of parties, as well in respect of the thing sold as of the price thereof. Each payment was a specific delivery of the quantity so paid for and piled upon the wharf, so as to vest the property in Plaintiff, leaving Defendant liable to no greater obligations than those which usually belong to wharfingers or bailees.

I hold as good the three following propositions:

1. That the contract of sale was complete, and, thereby,

(1) 16 Continuation de Toullier par Duvergier, n° 38; Troplong, *Vente*, n°s 82, 83, 85; 1 Pothier, *Vente*, n°s 308-9-10; 4 Pothier, *Traité de la propriété*, n°s 245-6-7.

(2) Troplong, *Vente*, n° 357.

the property vested in Plaintiff, and that, therefore, the price paid cannot be recovered back.

2. That, as soon as the contract of sale was perfected, the 875 pieces of birch timber were at the risk of the buyer, even if not delivered, though according to the usage of the trade they were.

3. That Defendant, after the payment of the price became a mere bailee and agent of Plaintiff, and was only bound to use the same diligence, and to take the same care of the timber as he would have done if the property had been his own, and was not responsible for the loss which had arisen from a *vis major*.

Here follow the remarks of the honorable judge Meredith, of the Superior Court.

MEREDITH, J.: The evidence as to the manner in which the contract was carried out is very contradictory. Herring, Plaintiff's chief clerk, swears that he repeatedly requested Lowndes to pile the timber intended for Plaintiff separately, but that Lowndes told him, that, in consequence of his having contracts with other merchants, he could not do so, and this witness distinctly asserts that this was not done. Speaking of the pile of timber, which Defendant asserts was intended for Plaintiff, this witness says: " I have been frequently to Lowndes's " wharf, in St. Paul street, for the purpose of seeing the timber " coming in and piling: I saw, in those visits to said wharf, a " large quantity of Birch timber piled there in a mass, perhaps " three times the quantity mentioned in the contract."

On the other hand Robert H. Jellard, who was in the employ of Lowndes, as a clerk and shipping culler, declares that the timber intended for Plaintiff was piled separately from Lowndes's other timber. On this subject the witness says: " In " the operation of collecting and piling said timber, that which " was intended for Plaintiff was piled separately, and the " commencement of the pile, was marked with his initials; it " was just the commencement of the pile, the part of the ground " tier that was marked with his initials might consist of from " 20 to 30 pieces. All the rest of the timber intended for Plaintiff " was afterwards piled at the same place, and was pointed out " by Patton to Herring, as the timber intended for Levy."

Great stress was laid by Defendants on the bill of parcels which was filed by Plaintiff and which is as follows:

QUEBEC, 1st March, 1845.

MESSRS. C. E. LEVY & CO.,

Dr. to JAS. J. LOWNDES,

To 14000 feet of birch timber to average

16 inches,	£466	13	4
To receiving charges on 875 p. a 6d. shipping charges, delivery 16d. per stick,	21	17	6
	488	10	10
By cash at sundry,	415	0	0
	73	10	10

Received payment,

JAS. J. LOWNDES.

25th April, 1845.

This paper was referred to by Defendants, as shewing that the logs contained in the pile had been counted and measured, and the whole appropriated to Plaintiff, with his consent.

As without the evidence which Defendants think they can derive from this paper, the important facts of counting and measuring are not proved, it is proper that that paper should receive particular attention.

At the time this bill of parcels was prepared, it is admitted that, in pursuance of the contract between the parties, Lowndes had as much timber piled on his wharf ready for delivery as Plaintiff could claim under the contract. Lowndes had therefore, under the contract, a right to claim the balance of the price of the timber.

Under these circumstances, independently of any specific appropriation of the pile of timber, Lowndes had a right to debit the Plaintiff with 14000 feet of timber. And, therefore, the first item in the bill of parcels is unimportant, for whatever may have been the facts of the case, that item would have been worded as it is worded.

The second item in the account is certainly equivalent to a declaration, on the part of Lowndes, that he had then, on his wharf ready for delivery, under the contract, 875 logs of birch timber, containing 14,000 feet. But the payment of the account cannot be regarded as causing even a presumption against Plaintiff of any thing more than this; that, so far as he had then the means of ascertaining, he was satisfied that Lowndes had then on his wharf, ready for delivery, a quantity of timber sufficient to fulfil his contract with Plaintiff.

It is not contended that, from the payment of the account, a delivery of the timber is to be inferred, for, under the contract, the payment was to be made in the course of the winter, although the delivery of the timber was not to take place until the following season of navigation; nor can it be contended that the rendering of the account, or the payment of it, proves that, as between Plaintiff and Lowndes the timber

was measured, for, at the time of the rendering of the account, the timber was in a pile described by Jellard as being about 12 feet high and 20 feet wide, and the evidence places it beyond doubt, that this pile was not deranged for the purpose of measurement, or for any other purpose, from the time it was formed until it was burned.

Considering these facts, and bearing in mind that Jellard (who was not employed in Lowndes's timber yard after the beginning of February) is the only witness who says that the pile of timber burned had been set apart for Plaintiff, and that this witness admits he has no positive knowledge, either as to the quantity or size of the timber contained in the pile, and bearing in mind also, that neither Lowndes's foreman, nor his book keeper, confirms the statement of Jellard, that the pile of timber burned had been appropriated to Plaintiff, by asserting a knowledge of that fact, and bearing in mind in fine, that Jellard's statement in this respect, has been contradicted in the most unqualified manner by Herring, we are of opinion that the Defendants have not legally established the exclusive appropriation to the Plaintiff of the pile of timber that was burned, or the quantity, quality or size, of the timber contained in that pile.

Assuming, however, for the sake of argument, that the pile of timber burned contained the whole of the birch intended for Plaintiff, and none other, and assuming also, that by measurement between Lowndes and the parties from whom he purchased the timber, it had been ascertained that the pile was formed of 875 pieces of timber, containing 14,000 feet, and this is the utmost that Defendants could ask to be considered proved, we would still be of opinion that Plaintiff ought to succeed, and this for the following reasons: 1stly. Because, although as between Lowndes and the persons from whom he obtained the timber, it may have been measured, yet as between Lowndes and Plaintiff, the timber, at the time of the fire, remained subject to measurement. 2ndly. Because, if at the time of the delivery of the timber under the contract, any part of it had been found unmerchantable, Plaintiff would have had a right to reject it. Lastly and chiefly, because, if, on the measurement of the timber, it had been found not to average 16 inches, as required by the contract, Plaintiff would have had a right to compel Lowndes to remove a part of the pile, and to substitute for the timber removed, timber of a larger size, so as to make up the average size required; and, in default of this being done, to reject the whole.

As to the measurement, it is not, I believe, contended that as between Plaintiff and Lowndes, the timber had ever been measured.

As to the right of Plaintiff to have examined the timber, to ascertain whether or not it was merchantable, it is true that Herring visited Lowndes's wharf very frequently, whilst the timber was being collected, but this did not afford him an opportunity of seeing that each log was merchantable, and it cannot be presumed that he renounced the right which Plaintiff had, under the contract of seeing that such was the case.

As to the average size of the timber required by the contract, Herring could not, whilst the timber was being collected, have objected to timber as being undersized, because the timber remaining to be collected might make up the average.

The average size of the timber was a matter of great importance, for birch averaging thirteen inches was worth but 7½d, whilst birch averaging 16 inches was worth 13½d; and there appears to have been a corresponding difference between other sizes.

It is also highly important to observe, that the bill of parcels upon which Defendants place so much stress, speaks of "14,000 feet of birch timber *to average* 16 *inches*" and not of birch timber *averaging* 16 inches; thus showing, that it had still to be ascertained by measurement, whether or not the timber did average 16 inches.

So far then was the subject of the contract from being perfectly certain, that it is quite possible, even if the fire had not occurred, that not one log of the pile would ever have belonged to Plaintiff. This appears to us as being the most important point in the case, and we regard it as decisive in favor of Plaintiff.

I shall now briefly advert to the authorities cited by Defendants.

The principal authorities from the French law quoted by Defendants, are Pothier, *Vente*, Nos 308, 9, 10, and Troplong, *Vente*, n° 357.

The authority in Pothier is familiar to every lawyer but, still, it expresses the law on the subject so clearly, that I shall read that part of it which appears to me most applicable upon the present occasion.

"Après avoir établi que la chose vendue devient aux risques "de l'acheteur, aussitôt que le contrat de vente a reçu sa per-"fection, il faut discuter quand est-ce que le contrat a reçu sa "perfection."

"Ordinairement, le contrat de vente est censé avoir reçu sa "perfection aussitôt que les parties sont convenues du prix "pour lequel la chose serait vendue. Cette règle a lieu lorsque "la vente est d'un corps certain, et qu'elle est pure et simple, "*si id quod venierit appareat quid, quale quantumve sit, et* "*pretium, et purè venit; perfecta est emptio.*"

" Si la vente est de ces choses qui consistent *in quantitate*, " et qui se vendent au poids, au nombre, ou à la mesure, comme " si l'on a vendu dix muids de blé de celui qui est dans un tel " grenier, la vente n'est pas parfaite que le blé n'ait été mesuré, " car jusqu'à ce temps, *nondùm apparet quid venierit*.....

" Cette décision a lieu non seulement lorsqu'on a vendu une " certaine quantité de marchandises à prendre dans un ma- " gasin où il peut y en avoir d'avantage, parce qu'en ce cas, " comme nous venons de le dire, jusqu'à ce que la mesure ou le " poids en ait été fait, ce qui a été vendu ne consiste encore " en aucun corps déterminé sur lequel le risque puisse tomber; " elle a lieu aussi dans le cas où l'on aurait vendu tout ce qu'il " y a dans un magasin, dans un grenier, si la vente en a été " faite à raison de tant par chaque millier, muid de blé, &c."

" La vente dans ce cas n'est point censée parfaite, et les mar- " chandises vendues ne sont point aux risques de l'acheteur, " jusqu'à ce qu'elles aient été mesurées ou pesées; car jusqu'à " ce temps, *non apparet quantum venierit*."

According then to Pothier, the mere fact of the property sold being subject to measurement, was of itself sufficient to cause the risk to remain with the seller. In the present case, however, the timber was not only subject to measurement, but as has been already observed, the Plaintiff had a right to examine it, in order to satisfy himself that it was merchantable, and the measurement was necessary not only to acertain the quantity of the timber, but also to ascertain that it was of the size required by the contract.

We know that the rule laid down by Pothier, to which I have adverted, has been questioned, but I have not any where seen it asserted that the risk should be held to have passed from the seller to the purchaser, whilst the subject of the sale remained indefinite and uncertain as, we are of opinion, it did in the present case.

The authority from Troplong (*Vente*, No. 357), is not at all opposed to the pretensions of the Plaintiff; and the opinion of that author at Nos. 82, 83 and 85 of the same work, is in exact accordance with that of Pothier.

We are of opinion Plaintiff's action must be maintained.

As to the damages, they are to be regulated by the market price of timber, such as that mentioned in the contract, on the 13th July, when Plaintiff made his demand.

The judgment of the Superior Court of the 1st July, 1851, BOWEN, C. J., and MEREDITH, J., in favor of Plaintiff is for £787 10 0, with interest from the service of process.

" It is by the court considered and adjudged, that said perpetual exception of Defendant be, and the same is hereby dismissed; and, considering that Plaintiff hath established, that he did

well and faithfully perform and fulfil all the obligations by him to be performed and fulfilled, under and by virtue of the agreement between him and James John Lowndes, bearing date the 12th day of December, 1844, and that he Plaintiff did pay to James John Lowndes the full price by him payable for the fourteen thousand feet of birch timber, mentioned in said agreement, but that James John Lowndes failed to deliver said quantity of fourteen thousand feet of birch timber, or any part thereof to Plaintiff, on the 15th day of July, 1845, when Plaintiff had a right to demand, and did demand delivery of the same, and considering that, on the said 15th day of July, 1845, the said 14,000 feet birch timber, at the place where tl e same ought to have been delivered, was reasonably worth the sum of £787 10 0 currency. It is, in consequence, considered and adjudged that Plaintiff do recover from Mary Anne Skitt, Defendant *par reprise d'instance,* in her capacity as such universal legatee as aforesaid, the said sum of £787-10 0 currency, with interest thereon, from the 15th day of September, 1845, until paid.

The case was taken to appeal.

Sir JAMES STUART, Baronet, Chief Justice: The action contains two distinct heads of demand, the first is for a restitution of the monies paid in advance on account of the contract, and the second is a claim for damages for the non-execution of the contract by Lowndes. To this action, Defendant has pleaded the general issue, and also an exception by which he alleges that the timber in question had been duly delivered to Plaintiff, and that, after such delivery, it had been destroyed by fire and lost to Plaintiff.

An important distinction must be made between the restitution of the monies paid in advance, and the claim for damages.

On the first point, we are of opinion that there was no legal delivery of the timber, so as to fasten the loss upon Plaintiff, and that, consequently, there was no completion of the contract.

As to the second point, the claim of damages, the sale was not a sale of birch timber generally, but of a specific determined quality of timber, to be collected north of Quebec, to be piled on a wharf during the winter, measured and delivered according to contract; and, it having been destroyed by fire, it could not be replaced by any other description of timber. Now this timber was destroyed by *vis major,* without any fault or neglect on behalf of Defendant Lowndes, who was thereby prevented from fulfilling his contract, and, in such a case, no liability attaches by law upon the party for damages, by reason of the non-execution of the contract.

In consequence of this distinction, we confirm the judgment of the court below, for the restitution of the monies paid in advance, and reverse it, in relation to the damages awarded by the said court.

ROLLAND, Justice: We all agree that there has been no delivery of the timber, but as to the damages, there is more difficulty. To be exempted from damages, for non-execution of a contract, there must have been an absolute impossibility; now this impossibility is hardly alleged in the exception, which had principally in view the delivery of the timber. However, Plaintiff has not claimed any special damages, but merely general damages by the loss of the profits; and finding in the books that, in such case, and in that of impossibility of the execution of a contract, the matter is left to the discretion of the judge, and the rules of equity ought to be extended; I concur in this judgment.

Sir JAMES STUART: We have considered the exception as sufficient to base the judgment we render. The judgment is as follows:

The Court of Queen's Bench, considering that the sale of the birch timber in question in this cause, by James John Lowndes to Respondent, never received its completion; and that James John Lowndes, at the time of the destruction of the said timber by fire, continued to be, and was owner thereof; considering also that it is established by the evidence in this cause, that James John Lowndes, during the winter which followed the making of the agreement declared upon, had collected a larger quantity of birch timber of the kind, quality and description mentioned in said agreement then necessary for the fulfilment of said agreement, and had piled the same, during the winter, on his wharves, as required by said agreement, of which quantity the timber in question in this cause made part; and, considering also that all said timber collected and piled as aforesaid, was destroyed by a *vis major*, which prevented James John Lowndes from delivering the timber in question in this cause, in pursuance and in execution of said agreement, without any *laches*, neglect or default on his part; and, considering also, that, by reason of the destruction of all said timber collected and piled as aforesaid, by a *vis major* as aforesaid, it became and was impossible for James John Lowndes to deliver the timber in question in this cause, and that the obligation of James John Lowndes to deliver the same, in execution of the said agreement, became and was thereby extinguished; and, considering, therefore, that for the causes mentioned in said declaration, Respondent was and is entitled to the restitution of the price by him paid to James John Lowndes, for said last mentioned timber, and nothing more.

It is adjudged, that the judgment appealed from, namely: the judgment in this cause rendered by the court below, on the first day of July, 1851, be and the same is hereby reversed, annulled and made void; and proceeding to render such judgment in the premises, as by the court below ought to have been rendered, it is, further adjudged that Respondent, for the causes set forth in his declaration, do recover from and against Appellant the sum of four hundred and eighty-eight pounds ten shillings and ten pence, current money of Canada, as and for the price by him paid to James John Lowndes, for the said birch timber, with interest on the said sum, from the fifteenth day of September, 1845, the date of service of process in this cause, until perfect payment; and that the action of Respondent in the court below, in so far as the same relates to any demand of damages, sum, or sums of money, over and above the said sum of four hundred and eighty-eight pounds ten shillings and ten pence, currency aforesaid, be and the same is hereby dismissed. (2 *D. T. B. C.*, p. 257 et 457.)

STUART, O., for Appellants.

PRIMROSE, for Respondent.

DEPENS.—DISTRACTION.

COUR SUPÉRIEURE, Québec, 14 avril 1852.

Présents: BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

GAUTHIER *vs.* LEMIEUX.

Jugé: Que les frais dans une cause ne peuvent être saisis et arrêtés, pendant l'instance, comme appartenant à la partie, par un tiers, son créancier, au préjudice du procureur. (1)

Pendant la litispendance, un tiers, créancier du Demandeur, avait fait saisir-arrêter entre les mains du Défendeur le montant dû au Demandeur.

Le Défendeur paya au créancier saisissant le montant qu'il reconnaissait devoir, ainsi que les frais encourus dans la cause, jusqu'au jour où la saisie-arrêt avait été signifiée, et plaida ce paiement.

La cour, par son jugement, déclara ce paiement valable quant au principal et intérêts, mais condamna le Défendeur à payer de nouveau les frais qu'il avait payés au créancier saisissant, et condamna le Demandeur à payer tous les autres frais subséquents.

DUVAL, juge: " Les frais appartiennent à l'avocat, et ils

(1) V. art. 482 C. P. C.

n'ont pu être saisis et arrêtés comme appartenant au Demandeur, avant que l'avocat ait eu l'occasion d'en demander la distraction."

Les procureurs du Demandeur firent alors une motion pour distraction de frais, qui leur fut accordée. (2 *D.T.B.C.*, p. 273.)

GAUTHIER et LEMIEUX, pour le Demandeur.

CASAULT et LANGLOIS, pour le Défendeur.

MANDAMUS.—LICENCES.

SUPERIOR COURT, Quebec, 8 juin 1852.

Before DUVAL and MEREDITH, Justices.

EX PARTE PATRICK LAWLOR, Petitioner.

Le maire et les conseillers de la cité de Québec, en vertu de la 14e et 15e Vic., chap. 100, sec. 5ème et 6ème, ont un pouvoir discrétionnaire quant à la confirmation ou au refus de confirmer les certificats pour licences d'auberge; et, dans l'exercice du pouvoir discrétionnaire qui leur est confié, ils ne sont pas sujets au contrôle de la Cour Supérieure ou des juges de cette cour en vacance. (1)

In his petition for a writ of mandamus, Applicant alleged that he had been a licensed tavernkeeper in the St. Roch ward of the city of Quebec, for the last 7 years; That, on the 4th March last, he applied for a renewal of his license to the municipal council of the corporation of the mayor and councillors of the city of Quebec, and presented, at the same time, the necessary certificate and affidavit, in that behalf required by the statute, and required the council, after due deliberation thereon, to approve the same, so that the Petitioner might be enabled to present the same to the revenue inspector, and obtain his license; That Petitioner's application, together with several others from persons residing in the same ward, and from other residents in the other wards of the city, was referred, by the council, to the police committee for enquiring into the merits of each case, which latter body, on the 5th April last, recommended the confirmation thereof; that on the 23d April, a petition, praying that no certificate or application for a tavern license in the said St. Roch ward, should be approved or allowed by the council, was presented to the latter by certain inhabitants of St. Roch, to the number of five hundred and upwards, who appeared *en masse* before the council, for the purpose, by intimidation, of coercing the members of the council then present to grant the prayer of

(1) V. art. 1022 C. P. C.

their petition ; That the council, neglected and refused to deliberate upon the merits of Lawlor's application, as they were enjoined to do by the Statute, but, on the contrary, granted the prayer of the petition of the inhabitants of St. Roch ward, to the effect that no certificate for a tavern license in that Ward should be confirmed by the council, and the council then rejected Lawlor's application, as well as those of the other applicants simultaneousley and indiscriminately, without any deliberation whatever on the respective qualifications and fitness of the several applicants, and ordered that the same should not be confirmed ; That the council had granted licenses to persons residing in the other Wards of Quebec, St. Roch ward alone excepted ; That the council were bound to grant licenses to fit and proper persons by law duly qualified, and that the council could not in the proper discharge of their duty, refuse to deliberate upon and approve the necessary certificates of applicants to that effect, except upon good and sufficient legal grounds to be set forth. That the petition from the inhabitants of St. Roch ward was illegal, and repugnant to the provisions of the Statute :

Wherefore, it was prayed that a writ of mandamus, directed to the the mayor and councillors of the city of Quebec, should issue, commanding and enjoining them duly to deliberate upon the Petitioner's application for a license to keep a house of public entertainment in the St. Roch ward of Quebec, and, thereupon, after such due deliberation, to approve and grant the same, unless upon good and sufficient legal cause to the contrary to be set forth by the council, and to make such order, in reference to the same, as might be in accordance with justice and the Statute of the Province.

Ross, Dunbar, appeared for the Petitioner, and said : The municipal council has, by the Prov. Stat. 14 & 15 Vic., chap. c, sec. 5, been invested with certain attributions in relation to the confirmation of certificates of parties applying for tavern licenses. That section enacts : " That no license shall " be granted to any person for keeping an inn, tavern, or " place of public entertainment, in any part of Lower Canada, " unless the person applying for the same shall produce to " the revenue inspector a certificate signed by fifty municipal " electors of the ward of the city, in which such house of " entertainment is situated, and approved after due deliberation " by the municipal council of the incorporated city, within ' the limits of which such inn, tavern, or place of public " entertainment , is intended to be kept, in the form expressed " in schedule (B) annexed to this act, and signed by the " mayor and secretary of such council,"

The schedule B referred to is a certificate to be signed by

50 of the municipal electors of the ward, to the effect that the applicant, who is desirous of obtaining the license, is personally known to each of them, that he is a British subject, honest, sober and of good repute, and that he is a fit and proper person for keeping a house of public entertainment.

Then follows the confirmation of the council: "The "foregoing certificate having been this day submitted to the "municipal council of, ... and the said council being duly "assembled, and having deliberated thereon, confirm the "said certificate in favor of .... therein mentioned."

By this clause no discretionary power to refuse is left to the council, there is a power only to approve, after mature deliberation. The council were charged with the duty of ascertaining if the requirements of law had been complied with, and if the applicant was a fit and proper person, and if so, then they were to approve his certificate. This limited duty or power of the council is wholly different from the extensive powers formerly vested by the laws of this Province, in the Justices of the peace who were sole arbiters of the right to grant or refuse tavern licenses.

The council, in virtue of the powers conferred on them by the act of incorporation (3 and 4 Vic., ch. xxxv, sec. 40), referred the Petitioner's application to the police committee, which consists of certain members of their own body, and which, by a by-law of the council, have a general superintendence over these matters.

The police committee made a report to the council recommending Lawlor's application; it then became the duty of the council to deliberate thereon, but that body has not done so, for they have rejected Lawlor's application, with a number of others, *en bloc*, without any attempt at discrimination, and consequently they cannot have deliberated upon the merits of each particular application.

The council have utterly misapprehended the nature of the power conferred upon them, for they possess no absolute power to reject the application, the power is to confirm and approve the certificate; their jurisdiction is limited by the statute.

The 6th section of the same act presumes a case which supports lawlor's position, for it is thereby provided, that, if, on the day appointed for holding a meeting of a municipal council, there be no *quorum* present, any certificate in the form (B) prescribed by the act, *submitted to such council for confirmation* on such day, may be confirmed by the mayor of such municipal council and two justices of the peace, not being municipal councillors, and, in case of a vacancy in the office of mayor, by any three justices of the peace, and it is

provided that these may refuse to confirm, and, therefore, it may be fully implied that the council cannot refuse.

If the council can reject, they can only do so by deciding on the merits of each application separately, and with due deliberation, and, when they have objections to the person applying, &c.; and the power of rejecting cannot be legally exercised in any other way.

The council are not invested with the legislative power to say that there shall be no tavern licenses in St. Roch ward, as well might they prevent them from existing throughout the city; they have no such extensive power.

The very title of the act in question is to make better provision for granting licenses to keepers of taverns, and for the more effectual repression of intemperance. The people of St. Roch ward imagine they can prevent intemperance by refusing to have licensed houses; the idea is erroneous. Neither the council nor the people of St. Roch have a right to enforce such a conclusion, even, were it wise, it would be presumptuous, opposed as it is to the will of the Legislature.

The act was intended to increase the revenue, but the act of the council tends directly to obstruct and prevent that end; they oppose their wisdom to that of the legislature.

The council had the power to delegate a portion of their authority as to the examination of the applications to a select committee, they have done so in this instance. The police committee has reported favorably thereon after deliberation.

DUVAL, J.: It is therefore evident that deliberation was had on Lawlor's application.

ROSS: Yes, by the committee, and they reported favorably, but no deliberation was had by the council which rejected the application.

Where an inferior body attempts to defeat the law, and deprive a man of his rights, the court will compel that body to act justly and legally. (1)

If the council have the power to reject the application, they are bound to assign their reasons therefor, in order that the superintending authority may ascertain whether a reasonable discretion has been exercised. (2)

Where inferior bodies exercise an illegal jurisdiction, or exercise it improperly, the court will interfere. (3)

The only remedy is by a writ of mandamus. (4)

(1) 2 Harr., Dig., p. 3822. (1 Maule & Sel., p. 697; *King* vs. *Caermarthem.*)

(2) Dowl & Ry., p. 148, *King* vs. *Hastings*. (5 Barn. & Ald., p. 692, note.); Grant on Corp. p. 387, note b.

(3) Grant on Corp., p. 226, note u.

(4) Grant on Corp., p. 252, note r.

The court may compel enquiry, though not approval. (1)

The court is invested with general powers to issue the mandamus. (2)

The corporation possess no arbitrary power to refuse uncontrolled by this court.

STUART, ANDREW, in support of the petition : The Petitioner complains of the refusal of the council to perform a duty imposed upon them by law ; therefore, he has a right to a mandamus. The council do not deny that no deliberation was had upon Lawlor's application, and here we might rest our case, as it it clear Lawlor is entitled to the writ.

The power of doing an act does not involve the right to do it. A judge and a jury have the power, if they choose to exercise it, of giving a wrong judgment, or finding a wrong verdict, but properly speaking they have no right to do so. The council may have the power to reject the application, but may commit a wrong in rejecting it, and thereby subject the Petitioner to to injustice. They may have the power, but they have not the right to refuse.

The petition from the people of St. Roch was illegal in its tenor and object ; not only was it subversive of the provisions of the statute, in asking that the applications should be rejected simultaneously, but also because it asked of the council to violate the law without reason. The council could not refuse to confirm the application without just cause.

It is manifest that from the fact of all the applications from St. Roch having been disposed of together, it is quite possible that although there was a majority of the council in favor of refusing all the applications *en masse*, (3) yet a majority might have been in favor of each separate application. This is exemplified in the case to be found in the 9th Vol. of Toullier, in which a will was submitted to the consideration of four judges. Each judge objected to the legality of a portion of the will, which was held by the others to be quite legal, while the other portions which each judge considered legal was disputed by some one or other of them ; so that although there were four points in the will objected to, yet there was a majority in favor of the legality of every one of the four, each judge, having one point to which he objected, was nevertheless placed in the minority by finding the other three judges unanimously against him on that point, and yet each differing in his own point from the other.

(1) Tapping. on Mand.,p. 13.

(2) 8 Mod. Rep., p. 149, *King* vs. *Cambridge* ; 1 Lev., p. 119, *Edluk* vs. *City of London ;* Styles, p. 443.

(3) As each councillor may have had objections to one individual.

The licenses are granted by the revenue inspector, the council have merely to see that the requirements of law have been complied with.

LÉGARÉ, against the application: The council are invested, by the 5th & 6th clauses of the above cited act, with the discretionary power of confirming or rejecting the certificate; by the 5th clause, the power to confirm, after due deliberation, is given, and that implies that they have also the power to refuse after due deliberation; I am prepared to show that due deliberation was had upon it; the present applicant complains that it has been referred to a committee instead of being deliberated upon by the council, but I am prepared to show by two affidavits which I will now produce, that, after the report of the committee was laid on the council table, due deliberation was had on it, and a division of the council, as appears by the minutes of the proceedings, took place upon it Then, having shewn that the council have deliberated upon it. I maintain that the court cannot interfere, and I refer the court to Angel and Ames, p. 656, to show that where a corporation or body is invested with a discretionary power, the court can interfere to compel it to exercise its discretionary power, but not to control it in its exercise of that power, or compel it to give a decision either one way or another. If it were the intention of the Legislature to invest the council merely with the power of checking the certificate, it would have caused the certificate to be laid before the city clerk for that purpose, and not before the council, as the city clerk is the person who has charge of the books and could tell immediately whether a person were a municipal elector or not.

TESSIER, U. J., against the application: If the council are not invested with a discretionary, but merely with a ministerial power, the result of the act for the repression of intemperance would be, that every person who demanded a license could compel the council to give it, and intemperance, instead of being repressed, as the act intended, would be most egregiously encouraged. But I maintain the council have a right to refuse, and that even the mayor and two justices, or any three justices, have the same power; The three points the present Applicant demands are: 1st, that the council be compelled to deliberate. 2nd, That they be compelled to grant or refuse; and 3rd, that they be compelled to assign their reasons for their decision. The first falls to the ground, inasmuch as it has been shewn that the council did deliberate; as to the second, the council have the right to refuse, this right is given to them by the 5th and 6th clauses of the act cited; the language of the 5th clause giving the council the power to confirm, is not imperative; if it were imperative, no municipal elector would have

the power of refusing to sign the certificate of any individual, no matter how profligate his character; it is perfectly clear this is not the intention of the act; the 6th clause clearly gives the discretionary power to grant, or refuse. I refer the court to Angel and Ames, p. 652, ch. XX, sec. 4, to shew that a mandamus can issue to compel a body to exercise its power but not to control it; and to shew that the application for a mandamus must shew a specific and absolute right; I also refer to the same work, pp. 10, 14 and 17, to shew the general power of corporations; and that they exercise a certain power like local republics and governments. If the council are obliged to assign their reasons in the exercise of their discretionary power, it must be shewn that some specific law requires them to do so, for I am unaware of the existence of any law which requires them to assign their reasons. The court has to assign its reasons for its decisions; but this duty is imposed upon it by the law establishing the court; but no law exists, that requires the city council to assign their reason for granting or refusing a certificate for license.

MEREDITH, J.: The chief question that we have to determine in this case is, as to whether the city council of Quebec have a discretionary power, as to the confirming or refusing to confirm certificates for tavern licenses; and, after having given to this important question due consideration, I am of opinion that, under the 5th and 6th sections of the Statute 14 & 15 Vic., ch. C, the city council are invested with a discretionary power in this matter; and, that, in the exercise of the discretionary power so vested in them, they are not liable to be controlled by the Superior Court, or the judges of this court in vacation.

In support of this opinion, I would advert particularly to the concluding part of the 6th section, in which we find these words, "and such council *may refuse to confirm any such certificate, if they see fit so to do.*"

The legislature have not said, that the council may refuse to confirm any such certificate, if the signatures to it be counterfeited; or, if the parties who gave it were not qualified so to do; or, if the facts certified be untrue.

The words of the law are, that such council "*may refuse to confirm any such certificate, if they see fit so to do.*"

It would, I think, have been difficult to select more suitable terms for the granting of a discretionary power than those which I have just quoted; and it is a well established rule of law, that where a discretionary power is granted to a corporation or its officers, the Courts of Justice will not control them in the exercise of that power. (1)

(1) See *Angel* and *Ames*, p. 581, and the cases there cited.

The reasonableness of this rule is illustrated by the present case. The members of the city council are sworn to discharge their duty according to "*the best of their judgment and ability,*" and give their votes in council under their oath of office. A majority of the council have, by their votes, given under oath, declared in effect, that they see fit to refuse to confirm the certificate. That certificate cannot now be confirmed, unless a majority of the same council, by their votes, under oath, as already mentioned, declare *that they see fit to do that* which they have already declared *they see fit not to do.* It is quite possible, perhaps even probable, that some of the members of the council may, upon further consideration, change their opinion as to the propriety of attempting, in the execution of the present law, to suppress all taverns in the parish of St. Roch; but the issuing of a writ of mandamus for the purpose of compelling them to do so, would manifestly be most unreasonable. If the question which has been submitted to the council could be submitted to us, we, in the exercise of our judgment, might deem it to be our duty to say, that we see fit to confirm the certificate of the applicant; but it does not therefore follow that we ought to attempt to compel the city council, in the exercise of their judgment, and upon their oath, to say that they see fit to confirm a certificate which, according to their judgment, ought not to be confirmed.

In order to shew to what extent a public functionary, invested with a discretionary power, is free from control in the exercise of that power, I will refer to the ruling of the judges in England in cases in which the commissioners for bankrupts had refused to sign the bankrupt's certificate, and read the following passage from Lord Henley's Digest of the Bankrupt law, p. 399: "The *discretion* of the commissioners in refusing their signatures to the bankrupt's certificate, was most elaborately discussed in the case Ex parte King, 7 Vesey, 417, by Lord Eldon, in which, and upon subsequent applications by the same bankrupt (13 Vesey, 181; 15 Vesey, 126), it was determined, in accordance with previous *dicta*, that the judgment of the commissioners is not liable to the control of the Lord chancellor; that they cannot honestly refuse their signatures unless, under the sanction of the oath which they have taken, they are satisfied that they ought not to sign; that the Lord chancellor may recommend them to review their judgment; but having reviewed all the circumstances of the case, he cannot, either by order or intimation, tell them, having taken that oath, that they are to act in any manner that is not consistent with their own conscientious judgment. The Petitioner in this case afterwards applied to the Court of King's Bench for a mandamus to the commissioners to certify, which was

refused." I will also refer to Deacon on bankruptcy ; vol. 1, p. 573, and to Greenleaf on Ev., n°s 73 and 431. (1)

Having expressed my opinion upon the principal questions in this cause, namely, as to the discretionary power of the council, and as to our authority to control them in the exercise of that power, I shall now attend to the objections which were urged against the form of proceeding adopted by the council, when they determined upon the application in question. It was contended, that at least there ought to have been due deliberation on the part of the council before they refused to confirm the certificate of the applicant ; and that there could not have been such deliberation on each certificate, as all the applications from persons resident in the St. Roch ward were rejected collectively. In answer to this objection, I would observe that it was not illegal to vote at one and the same time upon all the application which were liable to the same objection ; that objection being, of itself, deemed insuperable by a majority of the members of the council. Had each application from St. Roch been determined by a separate vote, the result would doubtless have been the same ; and upon a mere matter of form we ought not to attempt to dictate to the council.

For these reasons, I am of opinion that the writ of mandamus prayed for must be refused.

DUVAL, J. : The applicetion for a mandamus is made to the judges of the Superior Court, as the peculiar superintendent of all inferior jurisdictions and authorities, to compel the perfomance of a public duty imposed upon the mayor and councillors of the city of Quebec, by a provincial statute.

It must be borne in mind that we do not sit as a court of appelate jurisdiction, to revise the decision of the mayor and councillors, and bound to set aside that decision, should it not coincide with our own views on the subject ; with the *bien jugé* we have nothing to do, at present, it is altogether a question of jurisdiction ; are the mayor and councillors invested by law with a discretionary power in the matter, and, if they are, have we any right to interfere, and to control them in the exercise of that discretionary power ?

The authority of the mayor and councillors is given to them by the 14th and 15th Vict., ch. c, secs. 5 and 6. But before adverting more particularly to the power conferred by this statute, it is proper to see what power was previously vested, both in England and in Lower Canada, in justices of the peace to whom application for tavern licenses were made.

In a case referred to in Petersdorff, *verbo* mandamus, p. 471,

(1) Tapping. on mandamus, p. 13 ; 4 Ad. and El., p. 297 (judgment of Williams, J.) ; Selwyn's Nisi Prius, p. 1104 ; 1 Maule and Selwyn, 195.

the following was the language used in pronouncing the judgment of the court. " It has been truly said, that the power of licensing public houses is so absolutely in the discretion of the justices of the peace, that the court will never award a mandamus for the licensing of a public house." In the 1st Vol. of Dickinson, justice of the peace, p. 26, a work certainly of authority on such a question as the present, we find reported the words used by Lord Mansfield : " This court has no power or claim to review the reasons of justices of the peace, upon which they form their judgments in granting licenses, by way of apppeal from them, or overruling the discretion intrusted to them." In Archbold's practise of the crown office, it is laid down as a general rule, that, where a discretionary power is given to justices by statute, the Court of Queen's Bench will not interfere by mandamus to oblige them to exercise that discretion in any particular way, or to review the manner in which they have exercised it. In a comparatively late case, 14 East, 397, Lord Ellenborough, in granting a mandamus, said : " We do not, however, by granting the writ, at all interfere with the exercise of that discretion which the Legislature meant to confide to the justices in sessions ; we only say that they have a discretion to exercise, and that they must hear the application ; but, having heard it, it rests entirely with them to act upon it as they think fit." It is needless to refer to other decisions, the latest will be found to confirm the principle above laid down. In this country, the late chief justice Sewell, presiding in the Court of King's Bench for the District of Quebec, acted on the same principle of law, and refused to interfere by mandamus.

Now, we are to inquire if the same discretionary power is vested in the mayor and councillors ? It would, indeed, be strange to find the legislature refusing to this body properly called a " local legislature," that discretionary power in the arrangement of its local affairs, which has always before been granted to magistrates appointed by the crown. There is, however, no room for doubt ; for the 6th clause of the 14 & 15 Vict., ch. c, gives the power in express terms. In my opinion, the 5th clause, rightly interpreted, is equally conclusive on this point. The legislative power of the corporation over this subject has been delegated to it for the good of the city ; if that power is not exercised with sound discretion, the remedy must be found in the exercise of the elective franchise of the citizens.

In the present instance, we find the corporation had appointed a committee to report on the subject, the committee made a report; a number of citizens presented a petition, and then the whole was taken into consideration, when it was decided

that no tavern license ought to be granted for a particular ward: as the petitioners wished to keep no tavern in this ward, the council had not to inquire into the particular fitness or qualification of the Applicant as a tavernkeeper; he was told there would be no tavern allowed in the ward.

It has been argued that if the mayor and councillors have the power to reject a certificate for a tavern license in any one ward of the city, they have a right to prevent any tavern being opened in the city. The latter, in my opinion, is not a necessary consequence. But as, in this case, the question does not arise, I pronounce no opinion. When such a power is exercised, it will be the duty of the judges to determine whether the power has or has not been granted, and to take care that no municipal body legislates for any part of this District, under the specious pretext of carrying into execution a law of the land.

Before I close my observations, I will advert to a very strange notion entertained by some persons, and that is, that the party making the application is entitled to the writ at this stage of the proceedings, whatever may be our opinion hereafter. This opinion is without any foundation in law. In England, the court, in the first instance, grants a rule, calling upon the party to shew cause why a mandamus should not issue. If the party thus called upon, can shew good cause, it is needless to say, the writ is refused (1); even on an application for a *habeas corpus*, when the subject has been deprived of his liberty, the writ is refused, if the judge is of opinion that the party applying ought not to be discharged from custody or admitted to bail. Our own Provincial Statute, 12 Vict., chap. XLI, does not make it imperative on the judge to order the writ to issue in the first instance.

We must therefore refuse the writ. But I wish it to be distinctly understood, that our decision is confined to the case now before us, in which, in the exercise of a discretionary power, the mayor and councillors have decided there ought to be no tavern in a particular part of the city. We pronounce no opinion on the right of the mayor and councillors to decide that there shall be no tavern within the limits of the city, nor are we called upon to express any opinion on the wisdom or expediency of the resolution adopted by the council.

The said judges, considering that, by law, the mayor and councillors of the city of Quebec are invested with the power of confirming or rejecting, as in their discretion they may deem fit, certificates obtained for the purpose of procuring a license to keep a house of public entertainment; and, consi-

(1) Tapping, on mandamus, p. 15.

dering further that the judges of the Superior Court have no power to review the reasons upon which the mayor and councillors have formed their judgment, in granting or rejecting any such certificate, and cannot control the said mayor and councillors in the exercise of the discretionary power vested in them by law to this effect, do reject the application of the said Patrick Lawlor, for a writ of mandamus. (2 *D. T. B. C.*, p. 274.)

ROSS, DUNBAR, for Petitioner.
STUART, A., Counsel.
LÉGARÉ, for Mayor and Councillors.
TESSIER, Counsel.

PAROISSE.—DECRET CANONIQUE.—CERTIORARI.

COUR SUPÉRIEURE, Québec, 7 avril 1852.

Présents : BOWEN, Juge en Chef, et DUVAL, Juge.

Ex parte GUAY, Requérant pour Certiorari.

Jugé : Que le décret canonique de Sa Grâce l'Archevêque de Québec érigeant une paroisse, n'est pas une procédure civile qui puisse être revisée par la Cour Supérieure au moyen d'un writ de *certiorari ;* que ce n'est qu'une procédure purement ecclésiastique, hors de la juridiction de cette cour, tant qu'il n'y a point de procédures pour obtenir la ratification civile de tel décret.

L'Archevêque catholique de Québec, sur requête de certains francs-tenanciers de la paroisse de la Pointe Lévy, avait, par décret canonique, en date du 3 novembre 1851, ordonné le démembrement de cette paroisse, et la formation d'une nouvelle division sous l'invocation de Notre Dame de la Victoire, nonobstant l'opposition d'une autre partie des francs-tenanciers. Ces derniers, se croyant lésés par ce décret canonique, s'adressèrent, par l'entremise du Réquérant, Guay, à la Cour Supérieure, pour demander l'émanation d'un *writ de certiorari*, enjoignant à l'Archevêque de transmettre devant la cour le décret canonique, ainsi que tous les ordres et mandements, faits et donnés par Sa Grâce, et aussi les requêtes, contre-requêtes, et oppositions ayant rapport à la subdivision de la paroisse et à la formation et érection d'une nouvelle paroisse. Les opposants pour leur contre-requête avaient allégué : 1. que la minorité des francs-tenanciers de la paroisse de la Pointe Lévy avait demandé ce démembrement, et que la majorité s'y était opposée par contre-requête à Sa Grâce ; 2. que le lieu choisi pour la nouvelle église n'était pas central ; 3. que la paroisse de St-Joseph de la Pointe Lévy était alors endet-

tée de £400 ; 4. que la requête, demandant le démembrement, portait au delà de 80 signatures de personnes non francs-tenanciers ; 5. que la requête, demandant le démembrement, (les signatures illégales rejetées), ne portait que 275 signatures, tandis que la contre-requête en comptait 450.

Faisant droit sur les prétentions respectives des parties, Sa Grâce, le 13 novembre 1851, rendit son décret canonique d'érection, dont suivent les considérants :

" Considérant : 1. qu'il ne serait pas juste que la majorité des francs-tenanciers d'une paroisse, par la raison seule qu'elle est la majorité, eût le droit d'empêcher le demembrement de telle paroisse, surtout quand tel démembrement est réclamé par une impérieuse nécessité ; 2. qu'à la vérité, le nombre des francs-tenanciers de la paroisse de St-Joseph de la Pointe Lévy qui s'opposent à l'érection de la paroisse demandée, étant de 423, et plus grand de 67 que celui des francs-tenanciers de la dite paroisse qui, au nombre de 356, ont demandé la dite érection, mais que, dans les limites de la paroisse demandée, les francs-tenanciers, au nombre de 356 qui ont demandé la dite érection, ont sur ceux qui s'y opposent une majorité de 197, laquelle majorité est formée de gens qui doivent être considérés comme étant plus directement intéressés ; 3. que, s'il est admis que l'église maintenant en construction dans la paroisse demandée ne se trouve pas dans le vrai centre de la paroisse, elle est néanmoins placée à l'endroit considéré comme le plus à la convenance de la majorité de la population appelée à la fréquenter, non seulement pour le présent, mais encore et surtout pour l'avenir; 4. que ce qui restera de la paroisse de St-Joseph de la Pointe Lévy sera à la vérité de peu d'étendue, du moins en front, si elle est démembrée ainsi qu'on la demande ; mais que la dite paroisse ne laissera pas que d'avoir une population plus que suffisante pour occuper un prêtre ; que cette population qui, depuis quelques années, s'est grandement augmentée par l'affluence d'étrangers attirés par le commerce de bois qui s'y fait sur une grande échelle, ne peut que s'accroître encore rapidement dans un temps peu éloigné ; que, malgré son peu d'étendue, la paroisse n'en sera pas moins capable de procurer une existence honorable à son curé, attendu que celui-ci aura, outre sa dîme, la jouissance d'une terre, dont la concession d'une partie comparativement très minime lui assure déjà une rente annuelle de cent livres courant ; 5. que la paroisse St-Joseph de la Pointe Lévy n'est point endettée pour la construction de l'église paroissiale et du presbytère du lieu, mais que la fabrique de la paroisse reste seule responsable des dettes contractées pour la construction des dits édifices, sans que l'on puisse forcer en aucune manière les

paroissiens à se taxer pour le paiement des dites dettes; qu'il est, d'ailleurs, prouvé que les sommes dues à la fabrique, au 1er octobre 1851, et qui ne tarderont pas à être recouvrées, sont plus que suffisantes pour acquitter les dettes dont le montant n'excède pas la somme de £400 courant. En conséquence, nous avons démembré et démembrons de la dite paroisse de St-Joseph de la Pointe Lévy, &c., &c."

Les griefs du Requérant, quant à ce décret, étaient : 1. " Que les Opposants n'avaient pas été admis à prouver les allégués de leur contre-requête ; 2. que Sa Grâce s'en était rapporté uniquement au procès-verbal de son subdélégué ; 3. que, la majorité se trouvait encore du côté des Opposants, ainsi que constaté par le dit décret ; 4. que la fabrique était endettée au delà de £400 courant."

Le Requérant demandait à la Cour Supérieure un writ de *certiorari*, afin d'y plaider l'illégalité du décret canonique en question.

Sur cette demande, qui fut opposée de la part de l'Archevêque, et des intéressés à la formation de la nouvelle paroisse, la question débattue fut de savoir si la procédure de l'autorité ecclésiastique, procédant à l'érection canonique d'une paroisse, n'était pas une procédure purement ecclésiastique et non civile, et, par conséquent, en dehors de la juridiction des tribunaux civils, ou si, au contraire, ce n'était pas l'exercice d'un pouvoir *quasi* judiciaire, sujet à la revision de la Cour Supérieure, au moyen du writ de *certiorari*.

CHABOT, pour l'Archevêque, dit : L'érection canonique d'une paroisse ou cure est purement ecclésiastique. L'évêque seul a droit d'ériger des cures. C'était le droit de la France avant 1663 (1). Mais, pour donner l'effet civil à l'érection canonique d'une paroisse, il fallait le consentement du souverain. Jusqu'à l'Edit des mainmortes (1749), ce consentement tacite du souverain suffisait, mais, depuis, il fallait des patentes. En Canada, on a suivi ce qui se pratiquait en France. L'évêque a toujours, depuis la première enfance de la colonie, exercé le droit d'ériger des paroisses. L'arrêt du Roi de France du 3 mars 1722, (2) n'érige pas les paroisses, mais les suppose existantes, et ne fait que définir les limites d'icelles. L'évêque seul avait érigé ces paroisses et cures, et elles étaient reconnues par le gouvernement. Ainsi, dans les lettres patentes de juin 1702, (3) portant confirmation de l'union de la cure de Villemarie et de celles de l'Isle de Montréal, et de la côte de St-

(1) Héricourt, p. 634 ; 4 Code des Curés, pp. 447, 474 et 475 ; Ordonnance d'Orléans ; Ordonnance de Blois ; Edit de Melun.

(2) 1 Ed. Ord., p. 403.

(3) 1 Ed. Ord., p. 304.

Sulpice au Séminaire de Montréal, le Roi reconnaît que l'évêque de Québec avait érigé en cure et uni au dit Séminaire l'église paroissiale du dit lieu, et que l'évêque avait uni au dit Séminaire quatre autres cures, et le Roi confirme cette union. L'édit de mai 1679, (1) et l'arrêt du 12 juillet 1707, (2) au sujet des dîmes, parlent des curés, et supposent des cures existantes. Dès 1675, le Conseil Superieur de Québec, qui avait les pouvoirs d'un parlement, par arrêt du 18 mars, (3) condamne les marguilliers de l'église paroissiale de Québec à rendre certains honneurs aux officiers du gouvernement; et, le 22 du même mois (4), le dit arrêt est étendu à toutes les autres paroisses du pays. Le 18 novembre 1705, arrêt du même Conseil Supérieur, contre les curés de l'Ange-Gardien et Beauport, leur faisant défense, et à tous les autres curés du pays, d'exiger plus que le 26e minot de tous grains pour dîmes. (5) L'arrêt du même conseil de 1709 au sujet des honneurs des seigneurs dans les églises (6) reconnaît l'existence de paroisses. L'on trouve encore un grand nombre de jugements et ordonnances des Intendants pour la construction et réparation des églises, presbytères et sacristies avant 1722. Ce qui fait voir évidemment, que les paroisses et cures érigées par l'évêque seul étaient reconnues par le Gouvernement, de la même manière qu'elles étaient reconnues en France avant l'édit des mainmortes.

Depuis la cession du pays à l'Angleterre, l'évêque a continué à ériger seul les cures et paroisses en Canada. Cette érection est valide pour toutes les fins ecclésiastiques, et l'autorité civile n'intervient que quand on veut donner à ces paroisses et cures les effets civils ; le droit de l'évêque est reconnu par l'ordonnance du Gouverneur et Conseil, 31e Geo. III, chap. VI, en statuant que, quand il sera expédient de former des paroisses, la même forme de procédés usitée avant 1760 sera suivie, et que l'évêque ou surintendant des Eglises Romaines aura et recevra les droits de l'évêque du Canada, avant la même époque (1760.) L'évêque a donc continué depuis 1760 à ériger des paroisses comme il le faisait avant. La législature du Bas-Canada a reconnu ce pouvoir de l'évêque d'ériger des paroisses et cures, puisque par le statut de la 1ère Guill. IV, chap. LI,

(1) 1 Ed. Ord., p. 243.

(2) 1 Ed. Ord., p. 314.

(3) 2 Ed. Ord., p. 143.

(4) 2 Ed. et Ord., p. 145.

(5) 2 Ed. et Ord., p. 182.

(6) 2 Ed. et Ord., p. 182.

elle déclare que les autorités ecclésiastiques seules ont érigé des paroisses depuis l'arrêt de 1722, et elle pourvoit à la nomination de commissaires, non pour ériger de nouveau ces paroisses, mais seulement pour en constater les limites pour les fins et effets civils. Ce pouvoir de l'évêque d'ériger des cures est encore reconnu par l'ordonnance du Conseil spécial, 2 Vict., ch. XXIX, qui déclare que, dans l'érection des paroisses, il sera procédé par les autorités ecclésiastiques (les évêques), suivant les lois ecclésiastiques et les usages du diocèse, jusqu'au décret définitif d'érection canonique, et, ensuite, pourvoit à la manière de faire reconnaître ce décret canonique pour les effets civils. Dans le cas actuel, l'Archevêque de Québec a émané son décret canonique érigeant une nouvelle paroisse. Ce procedé est purement ecclésiastique, et cette cour ne peut intervenir. Si les *intéressés* demandent la confirmation de ce décret canonique pour lui donner les effets civils, comme la loi le leur permet, alors, et *alors seulement*, les autorités civiles pourront intervenir, non pas cette cour, mais le tribunal des commissaires nommés en vertu de l'ordonnance du Conseil spécial.

Le Requérant en cette cause doit être débouté de son application, vu que le décret canonique dont il se plaint est purement ecclésiastique. D'ailleurs, le Requérant qui demande un writ de *certiorari* ne fait pas voir qu'il ait été privé d'aucuns droits civils ou qu'il ait été condamné à payer quelque chose ; en un mot, il ne fait pas voir que dans l'émanation du décret canonique de l'Archevêque il y a quelque procédé ou chose judiciaire, ce qui est nécessaire pour obtenir ce writ. (1)

JUGEMENT : " Considérant qu'aucunes procédures n'ont été prises, suivant la loi, pour la ratification civile du décret canonique de Sa Grâce l'Archevêque Catholique de Québec, la cour refuse le writ de *certiorari*." (2 *D. T. B. C.*, p. 292.)

BOSSÉ, pour Guay.

Chabot et DELAGRAVE, pour l'Archevêque.

GAUTHIER et LEMIEUX, pour les paroissiens.

PROCEDURE.—APPEL.

SUPERIOR COURT, Quebec, 1 mars 1852.

Before BOWEN, Chief Justice, and DUVAL, Justice.

GERMAIN, Appellant, and VÉZINA, Respondent.

L'omission par un Appelant d'annexer copie du cautionnement en appel, certifié par l'officier en la garde duquel il est demeuré, à la requê-

(1) 5 Petersdorff, pp. 149-150 ; 1 Deacon's Crim. Law, p. 208.

te originale en appel, en conformité aux dispositions de la 12 Vict., ch. XXXVIII, sec. 55, est fatale. La cour ne permettra pas que l'Appelant en pareil cas supplée telle omission en produisant une copie du cautionnement. (1)

This was an appeal from the Circuit Court of the Portneuf Circuit. The bail bond given by Appellant was so given before a judge of the Superieur Court. The petition in appeal was filed by Appellant without any copy of the bail bond certified by the prothonotary in whose office it had been deposited being annexed thereto. Upon the petition being so filed, Respondent moved "that all right and claim of Appellant founded upon the appeal in this cause instituted, be declared forfeited, and said appeal hence dismissed, because no copy of the appeal bond given by Appellant, was annexed to the original petition in appeal.

At the hearing upon this motion, the Judicature Act, 12th Vict., ch. XXXVIII, sec. 55, was referred to by Respondent, and it was contended that the omission by Appellant to annex a copy of the appeal bond to his original petition in appeal, in compliance with the terms of the concluding proviso of the section referred to, was fatal to his right of appeal.

It was urged by Appellant that the bail bond having been given before a judge of the Superieur Court, and deposited with the prothonotary of that court, the original bond in appeal formed part of the record, and that the omission on the part of the Appellant to annex copy of the appeal bond could not be fatal to his rights, He offered to supply the deficiency and to furnish the requisite copy, and moved the court to that effect.

DUVAL, Justice: The proviso in the 55th sec. of the 12th Victoria is imperative upon Appellants to this court from judgments rendered in the Circuit Court for Lower Canada. The original appeal bond forms no part of the record in this cause, by the 54th section of the act above referred to, which constitutes and gives jurisdiction to this court, it is provided: "That the party appealing from any judgment rendered as aforesaid by the Circuit Court, shall, within fifteen days from the rendering of the judgment appealed from, give good and sufficient security to the satisfaction of the person before whom it shall be given, that he will effectually prosecute the said appeal and answer the condemnation; and such security shall be given either before any judge of the Superior Court, or the prothonotary thereof, and the bond shall then be deposited and remain of record in the office of the latter, or it shall be given before any Circuit Judge, when at the place where

(1) V. art. 1152 C. P. C.

the judgment appealed from shall have been rendered, or before the clerk of the Circuit Court at such place, and the bond shall then be deposited and remain of record in the office of the latter." If, in the present case, the bond in appeal had been given before a Circuit Judge, or before the clerk of the Circuit Court, where the judgment has been rendered, it is manifest that the bond would not be before this court, but would have remained deposited in the office of that clerk, as it is deposited in the office of the prothonotary of this court, and no copy of the bail bond having been annexed to the original petition, neither the court nor the party respondent have any means of testing the validity of the security given. Indeed, this court has no evidence in the record to show that any bail bond or security has been given at all.

The omission is fatal, and the Appellant must be declared to have forfeited all right founded upon his appeal. We cannot permit him to supply the deficiency, and his application to file a copy of the bail bond must be discharged, the late Court of Queen's Bench has refused similar applications. (1)

JUDGMENT: The court having heard the parties upon the motion of the said Louis Vézina, the Respondent, that all right and claim of Appellant, founded upon the appeal in this cause instituted be declared forfeited, and said appeal dismissed, seeing that a true copy of the appeal bond given by the above named Appellant, Prime Germain, hath not been annexed to the petition presented by said Prime Germain to this court, praying for the reversal of the judgment appealed from, it is hereby ordered and adjudged that said Prime Germain hath ferfeited all right and claim founded on the said appeal and that the said appeal be hence dismissed. (2 *D. T. B. C.*, p. 299.)

TESSIER, for Appellant.

LELIÈVRE & ANGERS, for Respondent.

PROCEDURE.—CERTIORARI.

COUR SUPÉRIEURE, Québec, 2 avril 1852.

Présents: BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

REGINA ex relatione MORISSET, *vs.* CARRIER, Défendeur.

Le Défendeur, dans le cas d'un writ de certiorari, ne peut contraindre le Requérant à procéder sur tel writ au moyen d'une simple motion à cet effet, il faut procéder en pareil cas par le moyen du *procedendo.*

Dans cette cause, il était émané, à la poursuite de Morisset,

(1) Joseph, Appellant, and Carrier, Respondent. Queen's Bench, Quebec, 1849.

un writ de certiorari, pour soumettre à la revision de la Cour Supérieure pour le Bas-Canada, certaines procédures d'une Cour de Commissaires ; le writ émana le 14 avril 1851, rapportable le 1er septembre ensuivant ; en effet, le writ fut rapporté en cour, avec la procédure qu'il s'agissait de reviser, le 29 août. Le 2 septembre il fut filé une comparution de la part du Défendeur Carrier. Depuis ce jour, 2 septembre 1851, jusqu'au 22 mars 1852, Morisset ayant négligé de faire aucune procédure dans la cause, Carrier fit motion que Morisset fût tenu, dans tel délai qui serait ordonné, de procéder, sur le writ de certiorari émané à sa demande, et que, faute par lui d'adopter, dans le dit délai, les procédures nécessaires pour amener à fin la dite cause, le dit writ de certiorari, et la procédure sur icelui prise, fussent mis de côté et annulés.

La cour fut unanimement d'opinion que le Défendeur ne pouvait, par simple motion, contraindre le Requérant à procéder sur le writ de *certiorari* émané à sa poursuite, et qu'il ne pouvait obtenir le résultat qu'il désirait qu'au moyen d'une motion pour l'émanation d'un *procedendo*. La motion est renvoyée sans frais. (2 *D. T. B. C.*, p. 302.)

GAUTHIER et LEMIEUX, pour le Requérant.

TASCHEREAU, J. T., pour le Défendeur.

PROCEDURE.—INTERVENTION.

SUPERIOR COURT, Montreal, 27 avril 1852.

Before DAY, VANFELSON and MONDELET, Justices.

LYMAN et al., Plaintiffs, *vs.* PERKINS, Defendant, *and* PERKINS, Intervening Party.

Jugé : Que le paiement de partie de la dette fait par le Défendeur pendant l'instance, ne peut faire la matière d'une intervention, mais doit être invoqué par un plaidoyer supplémentaire. Intervention basée sur ce moyen renvoyée sur motion.

Defendant was sued as drawer of a bill of exchange for £237 11s 8d. The proof was completed, and the case inscribed on the *rôle de droit* for hearing on the merits on the 1st of April, 1852. On the 20th of the same month, whilst the case was still on the roll for hearing, an intervention was filed by Defendant, on the ground that, since the inscription, Plaintiffs had received from the bankrupt estate of William Bradbury, the acceptor of the bill of exchange, a portion of the sum of money demanded by the action.

On the 23d of April, Plaintiffs filed a *retraxit* for £95 15s 7d, and, on the 26th of the same month, moved to reject the

intervention, upon the ground that the document in question was not an intervention, but only a paper-writing in the nature of an application to replead.

DAY, J.: This is not matter for an intervention at all, butfor a supplementary plea, what in England is known as a plea of *puis darrein continuance.* The proceeding must be by motion or petition accompanied by an affidavit alleging newly discovered matter.

JUDGMENT: "Considering that Defendant hath not, in the paper-writing, by him styled "intervention," filed in the said cause, set forth any matters, causes, or things, by reason whereof and by law he can become an intervening party in the said cause, and that the said paper-writing cannot by law be considered as a *demande en intervention*, doth grant the said motion, and reject the said paper-writing styled "intervention." (2 *D. T. B. C.*, p. 304.)

BETHUNE and DUNKIN, Attorneys for Plaintiffs.

MCKAY and AUSTIN, Attorneys for Intervening Party.

BREVET D'INVENTION.

SUPERIOR COURT, Montreal, 8 mars 1852.

Before DAY, Justice, and a Special Jury.

MUIR *vs.* PERRY.

Jugé : que celui qui a fait des améliorations aux pompes à feu par une nouvelle combinaison des parties qui les composent, de manière à en obtenir des résultats plus avantageux, a droit de prendre et faire maintenir des lettres patentes pour s'en assurer le privilège exclusif. (1)

This was an action for the infringement of a right of patent, secured under the Provincial Statute, 14 and 15 Vict., ch. LXXIX.

The declaration recited that Plaintiff was a British subject, and that, on the 27th October, 1847, he obtained letters patent for a "new and useful improvement in the method of cons- "tructing the best plates of end-working Fire Engines, and in "the method of placing the supply and delivery valves of "such enginess." The effect of such improvement being that the working barrel is more easily charged and discharged, and the emission of water from the air vessel rendered more effective and copious; That Defendant had infringed said letters patent, inasmuch as he "did work, use, exercise, and put in practice said invention, and divers parts of said invention,"

(1) V. s. 7 du ch. LXXI des Statuts Revisés du C. de 1886.

and did "make and manufacture divers end-working fire en-
"gines, to wit: a first class fire engine, according to and by
"means of said invention," and did "make an end-working
"fire engine, with certain improvements in the construction
"thereof respectively, which were indended to imitate and
"ressemble, and did imitate and resemble, said improvement
"so invented by Plaintiff," and "did make divers end-wor-
"king fire engines, in the construction of which he, Defen-
"dant, did imitate in part, and did make a certain addition or
"alteration in said invention, whereby to pretend himself the
"inventor thereof," and, thereupon, prayed that Defendant might be condemned to pay Plaintiff the sum of £60, being equal to three times the price for which Plaintiff had usually sold or licensed, or might have sold or licensed to other persons the use of said invention.

Defendant pleaded, 1st. The general issue. 2nd. That the pretended invention was not originally discovered by Plaintiff, but had been in use for fifty years before. 3rd. That the improvement, patented by Plaintiff, was the device of a committee of the Union Fire Company, composed of Plaintiff, Defendant, E. Maxwell, and John McWaters.

DAY, Justice, summing up, observed: In order to support his case, Plaintiff must prove all the facts by him alleged, for they have all been put in issue, and were declared by the articulation of facts suggested by him, and by the order of the court upon them, to be necessary. These facts are 1st. That he has letters patent for the alleged invention. 2nd. That he is the first and true inventor. 3rd. That the invention is useful. 4th. That it has been infringed by Defendant. 5th. The value of the invention, or, in the words of the statute, the amount for which it might be sold.

Counsel for Defendant has contended that Plaintiff has not set out any invention of a description that by law entitles him to obtain letters patent; admitting all he asserts to be true, there can, nevertheless, be no exclusive privilege and no right of action against Defendant. On this pretension the court is against Defendant. The inventions of machinery which may be made the subject matter of letters patent may be classed under three heads. 1st. New inventions of entire machines. 2nd. The addition or subtraction of parts in old machines whereby greater results are obtained, or the same results with less expense. 3rd. A new combination of old parts whereby greater results are obtained, or the same results with less expense. Plaintiff claims to have made an invention of this last class.

In endeavoring to improve machinery of this description, the attention of the inventor would naturally be directed to

one of two objects, either by new contrivances and adaptations to increase the energy of a given propelling power, or to diminish the resistance in either case the same result would be sought, namely, to do more and better work with the same power. Now the Plaintiff pretends that he has done, not the former, but the latter; that he has lessened the res stance, and this, not by adding anything or taking anything away, but by making a new arrangement and position of the valves, and by other changes which have been specified, so that the passage for the water is rendered more direct, and the obstructions to its easy and rapid propulsion decreased. The certain result of these changes (says the Plaintiff), is, that, by application of the same power, water can be projected further and in greater volume than can be done by the old machine. If Plaintiff can establish that he has introduced such an improvement, his invention, without doubt, entitles him to take out and to maintain letters patent for his exclusive right, and such right, it is to be observed, is not affected by the smallness in degree of the apparent change made by the new combination. If the change is certain and its improved result certain, and it is essential to such result, it is of no importance that it does not appear to be a great change. I now come to the evidence. The first thing to be proved is that the letter patent have issued. They are produced, and being under the great seal of the Province prove themselves. The second is that Plaintiff invented the improvement, and that it is new: upon this point the jury must be satisfied with such an amount of evidence as will afford reasonable ground for believing that the thing is new, for it is obviously impossible to know absolutely, in any case, that a given contrivance has never been used or seen by any body before. On the question, if the change be an improvement, there is on this head, the fact that the engine has done more than any engine has done before, and there is also the acknowledgment of Perry, though they do not prove the point, inasmuch as the jury are to decide the fact, not the admission of any person whatever. With respect to the infringement, that does not seem to be called in question by the Defendant. It is established that he made an engine with the improvements secured by Muir's patent: and any deviation is of no consequence, if Muir's plan was followed. If Plaintiff's proof is sufficient, it becomes necessary to assess the value of the improvement, for, in that case, the right of Plaintiff, under the statute, will be to recover three times the amount of such value. It is without doubt of importance that inventors should be protected in their just rights, but it is also of importance that the public should not be debarred from the free use of a machine, unless he who

claims an exclusive property in it, can justify his title by clear and strong evidence. The jury will have to find specially upon all the facts articulated and settled by the court, and, in order to enable them to do so, a copy of the paper is furnished them.

The jury found for the Plaintiff upon all the facts, and returned a verdict for £30. (2 *D. T. B. C.*, p. 305.)

MACK and MUIR, Attorneys for Plaintiff.

JOHNSON, F. G., for Defendant.

BREVET D'INVENTION.—PROCEDURE.

SUPERIOR COURT, Montréal, 4 mai 1852.

Before DAY, VANFELSON and MONDELET, Justices.

PROWSE *vs.* PANUELO.

Jugé : Que, dans une action pour infraction d'un droit de patente pour le Bas-Canada, l'allégué que cette infraction a eu lieu " dans le comté de Montréal " est une indication suffisante du lieu où l'offense a été commise.

Action for an infringement of a right of patent. The declaration alleged the granting of letters patent for Lower Canada, to Plaintiff, as inventor of a new method of constructing hot-air furnaces ; that Defendant, after the granting of the letters patent, " within the term of years in the said letters patent " specified or mentioned, and before the commencement of this " suit, to wit: on the 1st May, 1851, and on each and every " day between the last mentioned day and the commencement " of this suit, within Lower Canada aforesaid, to wit, *in the* " *County of Montreal* aforesaid, unlawfully, unjustly, &c. " (Setting out the infringement of the patent.)

The Defendant filed an *exception à la forme,* on the ground that the declaration did not point out with sufficient certainty *in what place,* parish, village, township, city, &c., the pretended *délit* had been committed, and that the allegation that it had been committed " in the County of Montreal " was insufficient.

MONDELET, dissenting: I would maintain the exception. The declaration should show Defendant what he is called upon to answer. There are a great many parishes in the Island of Montreal ; which is the one where the infringement took place? There is no express law, but the general rule I take to be this; that, whenever it is necessary to name any place, it should be

named so that the party who has an interest in knowing where it is situated, cannot be mistaken. (1)

VANFELSON, J., giving the judgment of the court, said : It is admitted that there is no express law upon the subject under consideration. If it is necessary to state the village or parish, why not the *Côte*, and if in a city why not the street or the number of the house ? In these questions of patents, I would test the sufficiency of the allegations by the English law. In the present instance, the Plaintiff has not taken so wide a latitude as he would be entitled to under the English form, where it is only necessary to allege an infringement within the limits of the locality for which the patent is granted. Exception dismissed. (2 *D. T. B. C.*, p. 311.)

MONK and BUCHANAN, for Plaintiff.

DRUMMOND and LORANGER, for Defendant.

CONTRAINTE PAR CORPS.—SHERIF

SUPERIOR COURT, Montreal, 23 décembre 1851.

Before DAY, SMITH and MONDELET, Justices.

MCPHERSON *vs.* IRWIN.

Jugé: **Qu'un ordre donné par la cour à Boston et Coffin, shérifs conjoints, de livrer une machine saisie par voie de revendication ne peut être mis en force contre Boston seul, resté seul shérif depuis l'ordre donné, en autant que cet ordre, ne lui avait pas été signifié, ni déclaré exécutoire contre lui : la règle pour contrainte contre lui à cet effet mise au néant.**

On the 4th April, 1849, certain machinery, part of a steam-engine was seized under process of revendication. Defendant moved to quash the seizure, and, on the 24th of July, 1849, judgment was pronounced, ordering the sheriff to deliver over to Defendant the articles and effects attached. On the 15th July, 1851, Defendant moved that, inasmuch as the judgment had been duly served " upon Boston and Coffin, " sheriff of the said district, on the 19th April last, and inas- " much as the said sheriff hath not complied with or excuted " said order or interlocutory judgment, but hath hitherto " wholly failed so to do, and said articles and effects so seized " have not, nor have any of them, been delivered over to De- " fendant, notwithstanding repeated demands have been " made to that effect, and that said effects are still in the " possession, custody and power of the sheriff of said district,

(1) Jousse, sur l'ordonnance 1667, Tit. 11, des ajournements, art. 1.

" that said sheriff of said district, John Boston, do appear, to " show cause, why said goods and effects have not been deli- " vered up to Defendant, and that said sheriff do, then and " there, deliver to said Defendant, said goods and chattels, in " compliance with the terms of said interlocutory judgment, " and, in default thereof, said John Boston be thereto *con-* " *traint par corps*, and committed to the common jail of this " district, there to remain until said articles and effects shall " have been duly delivered up, as aforesaid." Subsequently to the judgment, Coffin had resigned, and a new commission had issued on the 17th May, 1851, appointing Boston sole sheriff.

The sheriff showed cause against the rule, on the ground that the proceedings should have been taken against John Boston and William F. Coffin together, and that no responsibility for the acts of the joint-sheriff could attach to John Boston alone, that there was nothing to shew that the interlocutory judgment of the court had ever been served on John Boston, the present sheriff, or that the goods claimed had ever come into his possession ; and further alleged that a solvent guardian having been named, the sheriff was not responsible.

SMITH, J., dissenting: The question is whether a judgment against Boston and Coffin, joint-sheriff, can be made executory against Boston alone, I think it can. The commission of Boston and Coffin rendered them jointly and severally liable, and one of them could not escape by pleading the act of the other. On the retirement of Coffin, although a new commission became necessary, and, technically speaking, Boston alone was substituted in the place of Boston and Coffin, yet legally it was the same officer. There was no actual delivery of the property seized in this cause, from Boston and Coffin to Boston alone, nor was such delivery necessary : the law presumes that they still remain in Boston's possession. Besides the rule charges the sheriff with being still in possession of the property, and he has not denied this possession, but has met the rule with a technical objection."

DAY, Justice, in giving the judgment of the court, said: There is no doubt as to the right of Defendant to have the rule made absolute, but the question is as to the form and manner is which this right is to be urged. The common sense view is, I admit, that taken by my learned brother.

The commission makes no allusion to any resignation or to Boston having been previously joint-sheriff. The court, therefore, technically speaking, is not to know that John Boston, the present sheriff, mentioned in the commission is the John Boston who was formerly joint-sheriff with W. F. Coffin. The rule should have set this up, instead of which, it calls on

Boston, *de plano*, to produce the goods, or go to jail. I do not read in the rule, as my learned brother does, that John Boston has come into the possession of the goods seized as the successor of Boston and Coffin. It sets out: "that the said effects are "still in the possession of the sheriff of said district," and then there is a new paragraph "That said sheriff of said district, John Boston, Esquire, do appear" &c. Now Boston was not "sheriff of said district" at the time the order was made, but Boston and Coffin were, and there is nothing to show that the order has ever been made executory against Boston. I can see no difference between the position Boston holds here, and that which would be held by a person of any other name. Papers and other official documents which were in the hands of Boston and Coffin did not pass into the possession of Mr. Boston by the mere operetion of law. There must have been a transfer. [His Honor referred to the Statute 6th William IV, ch. xv, sec. XIII, regulating the office of sheriff.] This is undeniable when an entirely new party is appointed to the office, and I can see no reason why the rule is not to apply to a joint-sheriff re-appointed alone. The point is one of importance to the sheriff, and before we grant the rule we must see that the legal liability is clear and unambiguous. The grounds on which we discharge the rule are, that the judgment against Boston and Coffin has not been made executory against Boston alone, and that no transfer is alleged from one sheriff to the other.

JUDGMENT: The court considering that, by the interlocutory judgment, for the enforcement and execution whereof the said rule hath been obtained, the then sheriff of said district was ordered to deliver over to Defendant the articles and effects therein mentioned, and that William Fostor Coffin and John Boston, Esquires, were then joint-sheriff of said district, and that said William Foster Coffin and John Boston have since that time ceased to be such joint-sheriff, and John Boston, was afterwards appointed and now is sheriff of said district, and considering that it doth not appear that, at any time before the issuing of said rule, said interlocutory judgment hath been signified to or served upon said last mentioned sheriff now holding said office, or in any manner declared or made executory against him, and that, by reason thereof, and by law, he cannot be held liable according to and in the terms of the said rule, the same is discharged saving to the Defendant such other recourse as by law he may be entitled to." (2 *D. T. B. C.*, p. 313.)

A. and G. ROBERTSON, for Defendant.

ROSE and MONK, for Sheriff.

SUBROGATION.—COLLOCATION.

SUPERIOR COURT, Quebec, 24 juin 1851.

Before DUVAL and MEREDITH, Justices.

WURTELE et al., Plaintiffs, *vs.* HENRY, Defendant, and DIVERS, Opposants.

Jugé: Que le transport fait par un bailleur de fonds de partie d'une somme d'argent à lui due pour prix de la vente d'un immeuble, donne au cessionnaire le droit d'être colloqué concurremment avec le cédant, sur le produit de la vente du dit immeuble, nonobstant que tel transport soit fait par le cédant sans garantie quelconque, le cessionnaire l'acceptant à ses frais, risques et périls. (1)

In this case, the immoveable property of Defendant having been sold by the sheriff of the district of Quebec, a number of the hypothecary creditors of Defendant filed their claims, and among others were Opposant Aylwin, and Opposant, Campbell; both Opposants claimed a privilege as *bailleur de fonds* under the same title, being a deed of sale by Aylwin to Defendant of one of the lots sold in the cause, executed before Lindsay and another, notaries, the 7th May, 1845. Campbell further alleged a deed of assignment executed before notaries, the 31st May, 1849, by Aylwin to Campbell, of a portion of the said price of sale. This deed of assignment had been made " without any warranty whatsoever, unto the said Archibald Campbell, hereof accepting *à ses frais, risques et périls.*" The officer of the court, by his report of distribution collocated Aylwin, and excluded Campbell, upon which, Campbell contested the report; his reasons of contestation were in substance as follows: That Opposant Campbell, by law, had a right to be collocated and paid by privilege of *bailleur de fonds* equally and concurrently with Opposant Aylwin, out of the proceeds of the immoveable property sold, in proportion to their respective claims, because the claims of Aylwin and Campbell, respectively, were founded upon the same title, and that, therefore, his privilege was equally favorable with that of Aylwin.

MEREDITH, Justice : If the deed upon which the claim of Opposant Campbell is founded, were such as it was represented by the learned counsel for the creditors collocated, namely an acknowledgment of payment, accompanied by a subrogation; and, if that subrogation could be regarded as the act of the debtor, even with the consent of the creditor, the case would not be susceptible of difficulty.

Renusson, in the chapter referred to, puts the question that would then have arisen thus: " On demande si celui qui

(1) V. art. 1155, 1157, 1576 et 1577. C. C.

" prête ses deniers au débiteur pour acquitter partie de sa " dette, et qui stipule sa subrogation aux droits du créancier, " qui est payé de ses deniers, aura même hypothèque que le " créancier auquel il est subrogé, s'il viendra par concurrence " avec lui sur les biens du débiteur, ou si le créancier doit " être payé de ce que lui est dû de reste, préférablement au " subrogé." (1)

The author decides that a party, so lending money to a debtor, cannot be collocated to the prejudice of the creditor; and the justice of this decision appears to me to be unquestionable.

But the case put by Renusson bears, I think, no analogy to the case under our consideration.

The case in Renusson is that of a party who lends money to a debtor, to discharge part of a debt due by that debtor, and who stipulates for a subrogation in the rights of the creditor receiving the sum of money so lent.

In the case before us, Opposant Aylwin, assigns to Campbell part of a debt due to him, Aylwin, by Defendant, Henry; the price received by Aylwin being exactly equal in amount to the part of the debt transferred.

The effect of the sale and assignment thus made, was to vest the part of the debt thus sold, with all the rights attached to it, in the purchaser; and he is in as favorable a position, with respect to the part of the debt thus sold and assigned to him, as the seller is with respect to the part of the debt which he retained.

The law on this subject is very clearly explained by Duranton, Vol. 12, No. 187, p. 387, as also by Troplong, *Priv. and Hyp.*, Vol. 1, No. 367, p. 562; Battus, Vol. 1, No. 128, p. 217

I have not found any conflicting opinion as to the case now before us, which is that of an ordinary assignment; nor as to that mentioned by Renusson, which is the case of a subrogation by the act of the debtor (2); and the authors agree in saying, that even where the creditor who receives the money consents to a subrogation so made, it will not prejudice his right. The case with respect to which there is difference of opinion, is as to the effect of subrogation by the creditor to a third party, without the consent of the debtor. Toullier (3), Duvergier (4) and Persil (5), contend that such

(1) Renusson, *Traité de la Subrogation*, ch., xv.

(2) 7 Toullier, No. 169, p. 238.

(3) 7 Vol., Nos. 118, 119, p. 139; No. 120, pp. 146, 147, 148.

(4) 2 Vol., p. 355, 363, 364.

(5) 1 Vol., Priv. and Hyp., p. 82.

subrogation is equivalent to an assignment, and subjects the creditor to a warranty. Troplong (1), (who cites Pothier in support of his own views) is of a contrary opinion. It is obvious, however, that the Opposant collocated cannot derive any advantage from either of those views; and I mention the case in relation to which they are entertained, merely in order that it may be seen, that it bears no resemblance to the case before us.

Much stress was laid by the counsel for the Opposant collocated, on the declaration in the assignment that it was made without warranty.

It is not necessary now to enquire, what may be the effect of that declaration as between the grantor and the grantee, in the event of the latter being unable to obtain payment from the debtor (2); it is sufficient to observe that that declaration was not, I think, intended to operate, and cannot operate to the prejudice of the grantee, in so far as regards his right to rank on the property of the debtor.

I am therefore of opinion that the contestation must be maintained.

Judgment maintaining contestation, and ordering the report to be reformed, and Opposant Campbell to be collocated concurrently with Opposant Aylwin. (2 *D. T. B. C.*, p. 317.)

ANDREWS and CAMPBELL, for Opposant Campbell.

LELIEVRE and ANGERS, for Opposant Aylwin.

INTERVENTION.

SUPERIOR COURT, Montreal, 14 avril 1852.

Before DAY, SMITH and MONDELET, Justices.

SEYMOUR et al., Plaintiffs, *vs.* ST. JULIEN, the younger, Defendant, and ST. JULIEN, the elder, Intervening Party.

Jugé: 1° Qu'une intervention produite en vertu de la 92e section de l'Acte de Judicature, qui ne fait pas apparaître de l'intérêt ou droit d'intervention, peut être renvoyée et rejetée du record sur une simple motion; 2° qu'il n'est pas besoin d'une nouvelle inscription dans ce cas pour procéder à l'audition de la cause, lorsqu'elle a été suspendue par l'enfilure d'une telle intervention. (3)

Plaintiffs, traders and copartners, sued Defendant on an

(1) 1 Vol. Priv. and Hyp., No. 349, p. 535; No. 353, p. 542.

(2) 2 Duvergier, No. 267, p. 323; 1 Troplong, *Priv. and Hyp.*, No. 367, p. 563; 7 Toullier, No. 164, p. 234; See also, 10 Duranton, No. 489, p. 499.

(3) V. art. 154 et 157 C. P. C.

account for goods sold and delivered. The proof was completed, and the cause inscribed on the roll *de droit* for hearing on the merits, on the 1st of April, 1852. The following day, an Intervention was filed, in the name of Antoine St. Julien, the father of Defendant. This Intervention set forth the indebtedness of " Plaintiff " (*le Demandeur*) to the *Requérant*, in a sum exceeding the amount sued for, in consideration of which " *ce dernier* lui aurait transporté en paiement de partie de ce " qu'il lui devait, la somme réclamée par cette action, due par " le Défendeur, qui, étant alors et là présent, aurait accepté la " délégation et en aurait alors et là été déchargé par le Deman- " deur ; " no *acte* of transfer, delegation, or signification was filed with this Intervention, the effect of which, under the 92d section of the Judicature Act, was to stay proceedings.

Plaintiffs moved to reject this intervention, the grounds mainly relied on being 1st. Because no sufficient cause was disclosed on the face of the intervention to give the party a right to intervene ; 2nd Because it was not alleged that Plaintiffs were ever indebted to Intervening party, or were ever parties to the pretented delegation. 3rd. Because it was not alleged that the pretended delegation was ever accepted by Intervening party, or that he was a party thereto. The motion was accompanied by affidavits of Plaintiffs denying the allegations of the Intervention.

DAY, Justice : This a motion to reject an Intervention filed after inscription for final hearing, on the ground principally, that it does not disclose any right or interest in the Intervening party, and the point which arises is a new one, and is important as regards the practice of the court. The clause of the statute under which the Intervention has been filed is, (1) to say the least of it, of a very broad character, and seems to have been drawn without sufficient caution or regard to the possible use which might be made of it by dishonest litigants to retard the progress of a cause ; taken literally, an Intervening party can come in at any stage of the proceedings, and prevent a Plaintiff from obtaining his judgment, without having the shadow of a right himself. Such being the case, it is plainly the duty of the court to give the clause a beneficial interpretation, and deprive it, as far as possible, of the mischievous effects, which could not have been foreseen by the Legislature. The motion now before us must be granted for the following reasons: 1st. Because, the action having been brought by Plaintiffs, the Intervening party alleges an agreement with " the Plaintiff," without saying which of them. 2nd. Because, while the Intervening party alleges that the transfer

(1) 12th Vict., ch. XXXVIII, sec. 92.

was made when the Defendant was present, and promised to pay him instead of the Plaintiff, he does not say that he accepted thereof. 3d. Because the Intervening party shows no interest in the matter. Supposing all he says to be true, and the form of the Intervention regular, still he is without interest. The facts set up only give him a right of action against the Defendant, none to prevent the Plaintiffs from getting their judgment. The matter set up is matter which might have been set up by the Defendant, but which the Intervening party has not interest in setting up. If the Defendant did not choose to set up the transfer, that cannot affect the Intervening party's rights. If insolvency had been alleged, there might have been something to say, though I should still have had doubts. As it is, the Intervening party has no color of right, and the so styled Intervention is a piece of paper on which no judgment can be given, and which must be rejected.

On the cause (which had not lost its place on the roll) coming on for hearing on the original inscription, an exception was taken by Defendant's Counsel, to the effect that there ought to have been a new inscription, and that, inasmuch as he was not bound to know that the Intervention which had been filed, and of which he had received notice, was disposed of, the present inscription was irregular, and the cause must be struck from the roll.

On the 27th April, the court pronounced judgment in favor of Plaintiffs for the amount sought to be recovered.

DAY, Justice, in regard to the pretension set up by Defendant's Counsel, said : The clause of the Judicature Act merely provides that all proceedings, after an Intervention is filed, shall be stayed, nothing more. As soon as the obstructing cause, is removed, therefore, the parties remain as they were before. The court can adopt no other rule than this. If it were not so, it might be impossible for a party ever to get a judgment. If the Intervention in this case had been contested, and not dismissed, the rule would be different, and a new inscription would be necessary. As it is, it is not necessary. (2 *D. T. B. C.*, p. 321.)

FLEET and DORMAN, Attorneys for Plaintiffs.

DOUTRE, for Defendant.

LANCTOT, for Intervening party.

PROCEDURE.—PLAIDOYERS.

BANC DE LA REINE, EN APPEL, Montréal, 8 juillet 1852.

Présents : ROLLAND, PANET, AYLWIN et C. MONDELET, Juges.

HALCRO, Appelant, *et* DELESDERNIERS, Intimé.

Jugé : 1. Que sous l'opération des 86 et 87 sections du Statut de la 12e Vic., ch. XXXVIII, il suffit, dans aucun plaidoyer, d'énoncer les faits sur lesquels une partie entend s'appuyer, en termes clairs et précis, et auxquels s'appliquent les règles d'interprétation applicables aux mêmes termes dans les transactions ordinaires de la vie, sans qu'il soit besoin de formules particulières pour les exprimer ; (1)

2. Qu'on peut invoquer la nullité de l'acte sur lequel est basée la demande, par exception, sans recourir à une demande incidente, ou à une demande directe ;

3. Que cette nullité peut être opposée par exception, en tout temps, suivant la règle de droit, *quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.* (2)

L'action en Cour Supérieure était portée pour le recouvrement de £72 2s 6d, montant d'une obligation consentie par l'Appelant à l'Intimé, " pour valeur reçue, avant la passation " du dit acte, en effets et marchandises vendus et livrés par le " dit Intimé à l'Appelant, et dont ce dernier se déclara content " et satisfait. "

A cette demande, l'Appelant opposa deux exceptions, alléguant, par la première, que, longtemps avant, et à l'époque de la passation de la dite obligation, l'Appelant avait été et était alors dérangé dans ses facultés mentales, et incapable de comprendre, consentir ou devenir partie à aucune obligation, ce qui était à la connaissance de l'Intimé, et qu'ainsi la dite obligation était nulle ; l'Appelant concluait en conséquence à ce que le dit acte fût déclaré nul, et l'action déboutée.

Par la seconde exception, l'Appelant alléguait qu'au temps de l'exécution du dit acte, il était faible d'intelligence, et incapable de gérer ses affaires ; que l'Intimé, ayant eu des affaires avec Andrew Halcro, fils de l'Appelant, qui lui était endetté, aurait, conjointement avec le dit Andrew Halcro, par des menaces et des représentations injustes et frauduleuses, contraint et engagé l'Appelant à devenir partie à la dite obligation, le Défendeur étant alors d'un esprit faible, dérangé et disposé à subir l'influence de l'Intimé et de son fils ; et que l'Intimé et le dit Andrew Halcro, connaissant cet état de l'Appelant, et par les moyens susdits, l'engagèrent et le contraignirent à passer la dite obligation, comme si la dette eût été contractée en fa-

(1) V. art. 20 et 144, C. P. C.

(2) V. art. 136 C. P. C.

veur de l'Intimé par l'Appelant, ce que ce dernier niait ; et concluait à ce que la dite obligation fût déclarée nulle.

Le Demandeur répondit en droit aux exceptions, dont il demandait le renvoi, pour les raisons énoncées comme suit en sa réponse : parce qu'il n'est pas allégué, que le Défendeur ait jamais été interdit ; parce que le Défendeur ne peut, au moyen d'une exception, demander ni obtenir la rescision de la dite obligation, et parce qu'il s'est écoulé plus de dix ans depuis la passation du dit acte d'obligation et qu'il est maintenant trop tard pour en demander la rescision.

Les parties ayant été entendues en droit, la Cour Supérieure, composée des Juges SMITH et MONDELET, rendit le jugement suivant, le 22 juillet 1850 :

" The court, doth maintain the demurrers of Plaintiff to the " first and second pleas of the Defendant, and, in consequence, " doth dismiss the said pleas."

Le Défendeur Halcro appela de ce jugement qui déboutait ses deux exceptions, prétendant que la seule objection sur laquelle le Demandeur s'était appuyé, lors de l'audition, était manifestement mal fondée et contre la maxime reçue : " *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.*" Tant que dure la demande, tant dure l'exception. Cette règle, dit Bretonnier, (sur Henrys, tome II, liv. IV, quest. 64) est triviale au palais. L'Appelant citait également 7 Toullier, n" 598,600 et 602. (1)

La majorité de la cour (ROLLAND, juge, *dissentiente*), rendit le jugement qui suit :

" Considering that, under the 87th section of the Statute of " the 12th year of Her Majesty's reign, ch. XXXVIII, no form " of words is necessary in any pleadings, but the parties liti- " gant may respectively state *bonâ fide*, and to the best of their " belief, the real facts on which they intend to rely, and which " they allege to be true, and offer to prove, in plain and con- " cise language, to the interpretation of which the rules of " construction, applicable to such language in the ordinary " transactions of life, do and shall apply, so that no allegation " or statement may or shall be held to be insufficiently made, " if it would be ordinarily understood to have the meaning " intended by the party using it. Considering that, under the " 86th section of the same Statute, it is provided that to all " allegations of fact, in any pleading, the ordinary rules of legal " construction shall apply, so that it shall be sufficient, to sup- " port any pleading, that the facts in it agree sufficiently with

(1) Autres autorités citées par l'Appelant ; 10 Dalloz, *verbo* obligations, §2, n° 1, pp. 458, 659 ; 1 Domat (Edit. in 8vo, 1835) tit. 1, § 5, n° 1, pp. 151, 152, 191 ; *Ibid*, liv. 1, tit. 1, p. 380 ; Dénizart, *Décisions*, verbo *rescision*, p. 471 ; Pothier, *Obligations*, n° 49 ; 2 Troplong, *Vente*, pp. 163 et suiv.

" those proved to maintain the conclusions of such pleading, or " some of them, and that the court shall be of opinion that the " opposite party could not have been misled, by such pleading, " as to the real nature and effect of the facts intended to be " therein alleged and to be proved under such pleading ; and " that the facts, stated by Appellant, in his exceptions, suffi- " ciently apprise Respondent that Appellant rests his defence " on the ground of insanity, want of consideration and duress ; " considering further that, under the rule of law, *quæ sunt* " *temporalia ad agendum, perpetua sunt ad excipiendum*, " it was competent to Appellant to set up said defence, that " the conclusions taken by the Appellant are amply sufficient, " and that in the judgment of the court below, maintaining the " demurrers of the Respondent to the said pleas of the Appel- " lant, there is error : This court doth reverse the said judg- " ment appealed from, and, proceeding to render such judgment " as the court below ought to have rendered, doth overrule the " said demurrers, and doth order that the record be remitted " to the court below for the adduction of evidence upon the " issues tendered by the Appellant, and such further proceed- " dings had as to law and justice appertain." (2 *D. T. B. C.*, p. 325.)

A. et G. ROBERTSON, pour l'Appelant.

MACRAE et WOOD, pour l'Intimé.

BAIL EMPHYTEOTIQUE.

COUR SUPÉRIEURE, Québec, 22 avril 1852.

Présents : DUVAL et MEREDITH, Juges.

METHOT et al., Demandeurs, *vs.* O'CALLAGHAN, Défendeur, *et* LAMPSON, Opposant.

Jugé : Que la vente de ce qui reste à courir d'un bail emphytéotique, désigné comme tel dans l'avertissement du shérif, impose à l'adjudicataire l'obligation de payer le canon emphytéotique, quoique cela ne soit soit pas expressément dit dans cet avertissement, et quoiqu'il n'y ait pas d'opposition à fin de charge à cet effet ; et conséquemment, que le créancier, à qui est dû cette rente ou canon emphythéotique, ne peut pas demander à se faire indemniser à même le prix de l'adjudication, sous le prétexte que sa rente et ses autres droits résultant du bail sont perdus, parce qu'il n'a pas fait d'opposition à fin de charge. (1)

L'Opposant, Lampson, ayant omis de filer une opposition à fin de charge, pour faire vendre l'immeuble saisi en cette cause, sujet à une rente annuelle, à lui due, en vertu d'un

(1) V. art. 574 C. C.

bail emphytéotique, en réclamait la valeur par une opposition à fin de conserver, sur le prix de l'adjudication.

Le Défendeur contesta cette opposition. Il fondait sa contestation sur ce que l'Opposant n'avait pas perdu la rente annuelle, qui lui était due en vertu de son bail, au moyen du décret en cette cause ; car ce décret était la vente du bail même, lequel décret assujétissait, de toute nécessité, l'adjudicataire au paiement du canon emphytéotique.

" La cour considérant que la vente, par le shérif de ce district, du terme restant à expirer du bail emphytéotique mentionné dans son rapport, était une vente des droits du Défendeur sur la propriété décrite au dit bail, et que ces droits du Défendeur consistaient dans ceux qui lui sont conférés par le dit bail, de jouir de la propriété pendant un certain temps, à la condition de payer une certaine rente annuelle, canon emphytéotique stipulé au dit bail ; considérant que la dite rente est une partie essentielle du dit bail, et n'en peut être séparée, et n'a pu être et n'a pas été de fait perdue par la vente du terme à expirer du dit bail, déboute l'opposition du dit William Lampson, par laquelle il réclame, sur le prix de l'adjudication, la valeur de la dite rente. (2 *D. T. B. C.*, p. 331.)

CARON et BAILLARGÉ, pour les Demandeurs.

O'FARRELL, pour le Defendeur.

STUART et VANNOVOUS, pour l'Opposant.

ENREGISTREMENT.—VENTE PAR LE SHERIF.—BAIL EMPHYTEOTIQUE.

COUR SUPÉRIEURE, Québec, 22 avril 1852.

Présents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

MURPHY, Demandeur, *vs.* O'DONOVAN, Défendeur, et LAMPSON, Opposant.

Jugé : 1. Qu'il n'est pas nécessaire de faire enregistrer les anciens titres de propriété. (1)

2. Qu'un propriétaire, qui a laissé vendre sa propriété sur un Défendeur, qui ne la détenait qu'à titre de bail emphytéotique, peut demander d'être indemnisé de la perte de sa propriété sur le prix de l'adjudication. (2)

Le Demandeur avait fait saisir et vendre sur le Défendeur un immeuble, comme s'il en eût eu la propriété absolue, tandis qu'il ne le détenait qu'à titre de bail emphytéotique, en vertu d'un acte consenti par l'Opposant, William Lampson,

(1) V. art. 2098 C. C.

(2) V. art. 632, 652, et 729 C. P. C.

le 13 août 1847, pour 21 ans, à compter 1er août 1847, à raison de six livres courant par année. Lampson, propriétaire du fonds, et créancier de la rente ou canon emphytéotique, avait laissé vendre cet immeuble, sans former d'opposition en nullité de la saisie.

L'immeuble vendu, il s'était présenté, par opposition à fin de conserver, pour réclamer, par privilège, le montant de l'adjudication, comme étant la valeur de son immeuble induement saisi et vendu.

Son opposition fut contestée par le Demandeur, parce que le titre de Lampson n'avait pas été enregistré. Lors de l'argument, la question des droits du propriétaire et de l'indemnité qui lui est due, dans le cas posé plus haut, fut aussi soumise à la cour.

La cour considérant que le Demandeur, Patrick Murphy, a contesté l'opposition de Lampson, sur le principe qu'il n'a point fait enregistrer son titre d'acquisition de J. B. Forsyth, en date du 2 décembre 1840, ni fait enregistrer le bail emphytéotique par lui consenti au nommé Hogan ; considérant que l'enregistrement de ces actes n'était pas nécessaire pour conserver les droits de propriété réclamés par le dit Lampson ; considérant qu'une partie de la propriété du dit Lampson a été vendue comme appartenant au Défendeur, renvoie la contestation du dit Murphy, et maintient l'opposition du dit Lampson. (2 *D. T. B. C.*, p. 333.)

O'FARRELL, pour le Demandeur.

STUART et VANNOVOUS, pour Lampson.

PRESCRIPTION.—BILLET PROMISSOIRE.

SUPERIOR COURT, Montréal, 14 octobre 1852.

Before DAY, SMITH and MONDELET, Justices.

LAROCQUE et al. *vs.* ANDRES et al.

Jugé : Qu'un billet promissoire, payable à demande, est dû du jour de sa date, et que la prescription court contre tel billet de ce jour.

This was an action brought by Plaintiffs, the holders and indorsees of a promissory note, payable on demand, against Defendants, the makers.

The declaration alleged the making of the note by the Defendants, at Montreal, on the 25th February, 1837, payable on demand, to the order of T. S. Brown ; that Brown afterwards indorsed it to Plaintiffs, who, on the 10th January, 1850, caused a notarial demand to be made on Defendants, who

failed to pay it, whereupon the note was protested for non-payment, by means whereof Defendants became liable, conclusion for £150 12s. 1d., amount of note, and interest from date.

The Defendants pleaded : That the note, being a note payable on demand, became due and payable from its date ; that no action had been brought within five years.

MACKAY, for Plaintiffs, contended that the note, being a note payable on demand, could not be held to be due and payable in the sense of the statute 34 Geo. III, ch. II, until a demand had been made, and that prescription could only run from that time. It was a note *à terme*, and not to be due till after demand. It was true that it had been held in England, in favor of indorsers, that the statute of limitations, 2 Jac. 1, c. XVI runs against a note payable on demand from the day of its date, but the words of the English statute, were different from those of the provincial statute and the court here had to interpret the contract in connection with the provincial statute, without reference to English cases decided upon other words.(1)

DAY, J. J. *contrà*, cited Byles, on bills, pp. 107 and 260.

DAY, Justice : The authorities all show, that a note payable on demand, is payable from its date, and that prescription runs from then. The English authorities are conclusive on this point (2). This also is the evident construction which has obtained in actions brought on these notes in this court. Thus, if an action was brought on a note before it was due, the action would be dismissed ; but if an action was brought on a note payable on demand, and no demand was proved, it would not dismiss the action, but only affect the costs.

JUDGMENT :

" Considering that the promissory note in said declaration mentioned, being payable on demand, became and was due and payable on the day of the date thereof, and that a time exceeding the entire period of five years hath elapsed since the date of said note, without any suit or action having been brought thereon, within the said period, by reason whereof and by law, said promissory note ought to be, and is, considered and held to be paid and discharged, doth maintain the exception of the Defendants in the said cause firstly pleaded, and dismiss the action of the Plaintiffs. (2 *D. T. B. C.*, p. 335.)

MACKAY and AUSTIN, for Plaintiffs.

J. J. DAY, for Defendants.

(1) Byles on Bills, pp. 124 and 255 ; 9 Meeson and Welsby's Reports, 15 ; 4 Barnewell and Creswell, p. 235 ; 2 Rogue's Jurisp. Consulaire, p. 407 ; Guyot's Rep., v. Prescription ; Troplong, *Prescription*, No 802 ; Pigeau, vol. 1, p. 35.

(2) Ryan and Moody, p. 389 ; 1 Selwyn's Nisi Prius, p. 372 ; 15 Viner's Abridgment, p. 103.

CHEMINS DE FER.—RESPONSABILITE.

IN THE CIRCUIT COURT, Montreal, 30 juin 1852.

Before BRUNEAU, Justice.

ROCHELEAU *vs.* THE ST. LAWRENCE AND ATLANTIC RAILWAY COMPANY.

Jugé : Que dans le cas où une compagnie pour la construction d'un chemin de fer, n'est pas par sa charte obligée d'ériger des barrières dans les endroits où la ligne traverse un chemin public, telle compagnie n'est pas responsable des injures faites aux animaux errants sur telle ligne ; mais les parties dont les animaux errent ainsi sont responsables envers telle compagnie des dommages qui peuvent en résulter.

This was an action to recover the value of a cow killed by one of Defendants' trains, and for damages to the bridges and fences of Plaintiff, which Defendants were obliged to keep up. The declaration alleged carelessness and unskilfulness of the servants of the company in conducting the train, and that the accident was occasioned by like carelessness : damages laid at £10 10s.

Defendants pleaded that they were proprietors of the line of rail-road, and had a right to use the same, that the cow was trespassing, and that the accident had occurred through the negligence of Plaintiff, and notwithstanding the endeavours of their engineer and servants to avoid a collision. They set up the same facts by an incidental demand, and alleged that, by reason of the collision, four of their cars were thrown off the track, and damage suffered to a large amount, which they reduced to £50.

The evidence established that the cow had strayed on to the line of railroad from the public highway, and that notwithstanding the precautions taken by the company's servants in blowing the whistle, shutting off steam, &c., it was struck by the engine and thrown under the driving wheels. That, in consequence of the collision, four of the cars were thrown off the track, and considerable damage done, as alleged in the incidental demand.

BRUNEAU, J., in giving judgment, observed : It has been urged by the Plaintiff that the company are bound to erect a fence or gate where the railroad crosses the public road, and that he (Plaintiff) has a right to use the public road. By the first Act of incorporation, the company were obliged to have a gate at such crossings, but, by the amended Act, this obligation has been done away with, and now the company are only required to have a sign across their track, warning passers by, to " look out when the bell rings," and this they appear to have

done in the present instance. The company, therefore, are relieved of this charge, and the public are put on their guard, and, when they hear the bell ring, it is for them to get out of the way. There was, therefore, no negligence in this particular, chargeable on the company : the cow was where it should not have been, by the neglect of the owner. It is also in evidence that the farmers are in the habit of sending their cattle to graze along the railroad as affording good pasture. Plaintiff has proof that the train, at the time of the accident, was going at much more than the usual speed, and that the cattle were seen very far off, from which he would infer malice ; but it is shewn, on the other side, that the increased speed was, at the moment, necessary to enable the cars to mount an inclined plane, and, as to the animal having been seen at a distance, it would be absurd to require the train to stop whenever cattle, which might or might not be in the direct path, were seen trespassing on the road of the company. The necessities of trade are against this. It must be recollected that this railroad connects the waters of the St. Lawrence with the seaboard, and that interests of immense magnitude may depend on the company being able to fulfil its engagements with the public, in carrying passengers and goods at the time stipulated in their advertisements. But, if courts of law were to sanction the doctrine that the railroad company are bound to stop their trains, whenever cattle are found straying on the line of road, it is quiete evident they could never fulfil their engagements, and the public interests must suffer. It is quite evident that the same judgment must be rendered, on the principle demand, as was lately rendered in the cause of *Vincent* vs. *The same Company*, for killing a horse, and the action of the Plaintiff is accordingly dismissed.

The court has had more difficulty with the incidental demand, but, as it appears that the cow was a trespasser, and that, notwishtanding the precautions to avoid a collision taken by the company's engineer, such collision took place, through the fault of the incidental Defendant, the company must have judgment, but only for a small amount, as they have failed to establish the precise amount of damage. The judgment therefore will be for £4 10s., which is the amount proved to have been paid to the company's workmen, in replacing the cars on the track. (2 *D. T. B. C.*, p. 337.)

PELLETIER and PAPIN, for Plaintiff.

A. and G. ROBERTSON, for Railway Company.

BIGAMIE.—ACTE D'ACCUSATION.

QUEEN'S BENCH, CROWN SIDE, Montreal, mars 1852.

Before ROLLAND and AYLWIN, Justices.

THE QUEEN *vs.* MCQUIGGAN, upon indictment for bigamy.

Jugé : Que dans un acte d'accusation pour bigamie, commise dans un pays étranger, il est nécessaire d'alléguer dans tel acte que le prévenu est un sujet anglais, qu'il est ou qu'il a été domicilié dans cette Province, et qu'il en est parti dans l'intention de commettre le crime.

Il semble, que le mot " ailleurs " dans le statut provincial de la 4e et 5e Vict., ch. XXVII, sec. 22, s'étend à la bigamie commise dans une juridiction étrangère. (1)

The prisoner had been convicted of bigamy, as laid in the following indictment.

" The jurors do present that Patrick McQuiggan, late of " the Township of Hemmingford, in the district of Montreal, " laborer, otherwise called Patrick Carroll, on the thirteenth " day of January, in the ninth year of the reign of our sove- " reign Lady Victoria, at the parish of Anna Mullin, in the " county of Managhan, in that part of the United Kingdom " of Great Britain and Ireland, called Ireland, did marry one " one Rose Carroll, spinster, and her the said Rose Carroll, then " and there had for his wife, and that the said Patrick " McQuiggan, otherwise, &c., afterwards, and whilst he was so " married, &c., on the seventh day of June, in the fourteenth " year, &c., at the town of Moers, in the county of Clinton, in " the State of New York, one of the United States of Ameri- " ca, feloniously did marry and take to wife Electa Proper, " and to her the said Electa Proper was then and there " married, the said Rose Carroll, his former wife, being then " alive; against the form of the statute in such case made and " provided, and against the peace of our said Lady the " Queen, her crown and dignity; and the jurors, &c., that " the said Patrick McQuiggan, afterwards, to wit, on the twen- " ty-fifth day of August, &c., at the Township of Hemming- " ford aforesaid, was apprehended for the felony aforesaid."

KERR, for the prisoner, now moved in arrest of judgment, submitting the following grounds : 1. Because, by the indictment on which the prisoner has been found guilty, no crime against the constitution, statutes, or common law of this country, has been shewn or alleged to have been committed by him. 2. Because the offence committed as laid in the indictment is an offence committed in the United States of America, and is cognisable alone by the laws of that country. 3. Be-

(1) V. la s. 4 du ch. 161 des Statuts Revisés du C. de 1886.

cause the said indictment does not negative the exception expressly mentioned in the clause of the statute creating the said offence.

In support of these grounds, he said: An important point of international law is involved in the decision of this case, viz: whether by the word " elsewhere" in the enacting clause of the statute regarding this offence, jurisdiction is given to the courts of this Province, over offences committed in a foreign and friendly State. The great object of international law being the preservation of peace between the nations of of the world, all the domestic concerns of each State are left to its own management. To each State is committed the task of framing laws for its own peace, good government, and welfare, and of punishing all crimes committed within its own boundaries; and this is but just and right, for that which a man may legally do in one country may constitute a crime in another. Thus, a man is allowed, by law, four wives in Turkey, but, by our laws, he would be liable to be tried for bigamy. It is evident, therefore, that the extension of the word "elsewhere" to foreign countries would tend to violate the principles of international law, and lead to the greatest injustice. On this point, I refer to Story's conflict of laws ch. XVI, sec. 20, and the authorities therein mentioned, and Kent's Com., pp. 21, 37.

The next point to be considered is, whether the Legislature of Canada had any extraordinary power granted to it, under the imperial act of the union, by which the interpretation of the word " elsewhere," as insisted on by the Crown, could be justified. I contend that it has not, that the Province of Canada must be considered as an incorporation created by act of the imperial Parliament, and vested with certain powers of which the British Parliament has divested itself in its favor. That the Provincial Legislature cannot exceed the powers so conferred on it, and if it does so, the act, as regards this excess of power, is null and void. (1)

Mr. Justice AYLWIN here interrupted the counsel to express his entire dissent from such a doctrine. The judges in this country had to administer the law as they found it, and not as the judges of the Supreme Court in the neighbouring States, to set in judgment on the law itself.

KERR, proceeded: Supposing the court pass sentence on the prisoner, and that he suffers the penalty of the sentence, can the court, on his discharge, grant and secure to him immunity from any further prosecution for this offence? Will the courts

(1) 7 and 8 Will. III, ch. XXII and XXIII; 4 Will. IV, ch. XXIX, sec. 56; 1 Stephen's Com., 102.

of the State of New-York, on the trial of the prisoner there, for this offence committed in the body of that State, maintain his plea of *autrefois convict*, grounded on the record of conviction of this court? Will the court say, under the constitution of the United States, by which concurrent jurisdiction is prohibited to the individual States, this court has jurisdiction? (1) I contend that all the courts in this province, and particularly the Court of Queen's Bench, has power to explain any ambiguous terms in any act, especially one whereby that which was not formerly indictable at common law, is created a felony; all penal statutes are to be construed strictly, and the court should lean, if there are any doubtful terms in the act, to the side of mercy and lenity: the court has a right to expound the meaning even against the letter of the statute. It has a right to consult the preamble, and also any former acts which may have reference to the subject: the only reasonable interpretation to be given to this word "elsewhere" is, that it was intended to give jurisdiction to this court over offences committed in the other dominions of Her Britannic Majesty, any other interpretation would be contrary to law, justice and reason: the act of James, under which the offence existed before the present act, was as extensive as possible, and yet it was always held not to touch such a case as this, the mere addition of the word "elsewhere" can give no greater jurisdiction. (2)

The words of the statute are as follows: "And be it enacted "that if any person, being married, shall marry any other "person, during the life of the former husband or wife, "whether the second marriage shall have taken place in this "Province, *or elsewhere*, every such offender, &c., shall be guilty "of felony, provided always that nothing herein contained "shall extend to any second marriage contracted out of this "Province by any other than a subject of Her Majesty resi-"dent in this Province, and leaving the same with intent "to commit the offence, or to any person marrying a second "time whose husband or wife shall have been continually "absent from such person for the space of seven years "then last past, and shall not have been known by such person "to be living within that time; or shall extend to any person "who, at the time of such second marriage shall have been "divorced from the bond of the first marriage; or to any

(1) Duponceau, on jurisdiction, pp. 23, 205, and 209.

(2) 1 Blackstone, p. 88; Deacon's Digest *verbo* Statute; Wilson's Reports (T. t. 3: Geo. III), 1763, *Wolferston* vs. *Bishop of Lincoln*; Montesquieu B. 7, C. 3; Grotius, B. 2, C. 16, S. 12, N. 2; also, as to point of international law, 3 Burrow, p. 1480, *Triquet et al.* vs. *Bath*.

" person whose former marriage shall have been declared void
" by the sentence of any court of competent jurisdiction."

ROLLAND, Justice: This is a motion to arrest judgment in the case of a man convicted of bigamy. We have no difficulty whatever in giving a decision on this motion. A good deal has been said about this court not having jurisdiction; but the word " elsewhere " is, in our opinion, quite sufficient; but the indictment is defective, it is not therein alleged that the accused is a British subject (the act bearing upon British subjects alone, committing such an offence in foreign countries) and we have no hesitation in arresting the judgment. It is absolutely necessary in all parallel cases that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in this Province, and that he left the same with intent to commit the offence. These allegations being wanting, judgment is arrested, ant the prisoner discharged.

AYLWIN, Justice, concurred in what had fallen from the learned President of the court. (1) (2 *D. T. B. C.*, p. 340.)

DRISCOL, Q. C., for the Crown.

KERR, for the Prisoner.

(1) Dwarris, on statutes, 660-667; and cases there cited, viz: Burr. 154, *Rex* vs. *Jarvis*; 1 East, 649, *Rex* vs. *Stone*; 1 T. R., 141; 7 T. R., 27; 1 Russell. C. and M. 191, Note T. " It seems, however, that when the jurisdiction of the court depends upon particular circumstances, exclusive of the offence itself, it is in general unnecessary to aver them upon the face of the indictment." 1 Moody, 407, *Rex.* vs. *Frauer.*

Note.—In this case, the proof of the first marriage was attempted to be made by the voluntary examination of the accused, taken before Thomas Clancy, Esquire, the committing magistrate, but this being irregular and defective, its reception was successfully objected to by the counsel for the prisoner. The Crown then tendered the evidence of Mr. Clancy, as to the story the prisoner told him when taken before him after his arrest. This the court held to be good evidence, and allowed it to go to the jury, this was the only evidence of the first marriage, the prisoner having on that occasion, as Mr. Clancy deposed, confessed to him that he was guilty of the offence, as charged, and at the same time expressed his readiness to return and live with his first wife. The second marriage was proved by the evidence of the clergyman who solemnised it.

DECRET.—PREUVE.

IN THE QUEEN'S BENCH, IN APPEAL, Three-Rivers, 19 juillet 1852.

Before SIR JAS. STUART, BART., C. J., and ROLLAND and PANET, Justices.

MALLORY, Appellant, and HART, Respondent.

Jugé : 1. Que dans le cas de vente privée de terres non défrichées et en bois debout, la tradition est nécessaire pour transmettre la propriété.
2. Qu'à défaut de prise de possession par l'acquéreur par titre privé, ces terres peuvent être légalement saisies et décrétées sur le vendeur.
3. Que le décret saisit l'adjudicataire dans ce cas, au préjudice de l'acquéreur qui n'a pas pris possession de fait (1)
4. Qu'un partage homologué en justice entre cohéritiers, fait preuve à l'égard de tiers de la qualité de tels héritiers, sans qu'il soit nécessaire de produire les certificats de baptême et de marriage.

The appeal was instituted from a judgment maintaining the opposition *à fin d'annuler*, filed by Respondent. The original action was brought by Appellant, Plaintiff in the court below, against one Ami J. Parker, and in satisfaction of the judgment, certain lands were seized as belonging to Defendant. Respondent claimed the lands, and, by her opposition, alleged that, on the 28th February, 1814, Ezekiel Hart, her father, purchased, at sheriff's sale, the lots of land which had been seized as belonging to Oliver Barker, under a writ of execution, and that, after the formalities had been observed, the lands were adjudged to the late Ezekiel Hart by the said sheriff, by means whereof the said late Ezekiel Hart, thereupon immediately became seized and possessed of the said lots of land as the owner and proprietor thereof, until his death, which occurred on the 16th September, 1843, leaving a certain number of children, and, among them, Opposant, Harriet Hart, and that by a deed of partition between the said children, said lots of land so acquired at sheriff's sale by Ezekiel Hart, were allotted to Respondent, and concluded that she, Respondent, might be declared the owner and proprietor of said lots of land, and that the seizure thereof might be declared null.

Among the exhibits filed by the Respondent in support of her opposition were: 1° deed of sale, by sheriff to the late Ezekiel Hart, dated 1st March, 1814; 2° deed of partition of the estate of the late Ezekiel Hart and *uxor*, passed before LaBarre; 3° copy of a judgment homologating said deed of partition.

(1) V. art. 632 C. P. C.

This opposition was met by an answer setting forth that the sheriff's deed to Ezekiel Hart did not convey any right of property to him, because Oliver Barker, named as Defendant in the suit of *Hart* vs. *Barker*, was not, at the time of the adjudication, and had not for eleven years previous thereto, been proprietor or possessor of the lots in question, all which lots, at and previous to the adjudication, had been, as the late Ezekiel Hart then well knew, the property and in the possession of Samuel Hickok, of Burlington, Vermont, from whom Defendant acquired the lands, by deed of the 16th September, 1847, passed before Jobin and colleague, notaries. The Plaintiff then proceeded to set forth a deed of sale of the 23d May, 1803, passed before Prevost and colleague, notaries, from Oliver Barker to Samuel Buel, and a deed of sale of said lots from said Buel to said Hickok, before Barbeau and colleague, notaries, dated the 19th January, 1807. That, after the deed from Barker to Buel, Barker had neither title to nor possession of any of said lots, of all which, Ezekiel Hart, at the time of the alleged adjudication, was well aware, but, notwithstanding such knowledge, caused the lands to be taken in execution as belonging to Barker, in order to become the purchaser thereof, by sheriff's sale, and that, if the lands were delivered to the sheriff by Barker, it was done by connivance between him and Hart, and that the latter might become the purchaser. The Plaintiff then alleged that the *partage* referred to did not convey to the Opposant any title to the lots in question, inasmuch as, in so far as relates to the lands, it derived all its validity from the alleged sheriff's deed which was null. Plaintiff therefore prayed for the dismissal of the opposition. Three witnesses were examined on behalf of the Plaintiff, but no one could establish any tradition to or possession by Buel or Hickok, prior to the sheriff's sale to Ezekiel Hart, and, on the 30th August, 1849, the following judgment was rendered. Present: D. MONDELET, GAIRDNER and AYLWIN, Justices.

The court, considering that, immediately before the time of the adjudication of said lot of land to Ezekiel Hart, and of the giving and granting to him by the sheriff of the district of Three-Rivers a deed of sale for the same, Oliver Barker, upon whom the said lot was seized, was the possessor of the same, the sale of the said lot by the said Oliver Barker to Samuel Buel not having been followed by tradition; it is considered that the opposition of the said Harriet Hart be and the same is hereby maintained, *dissentiente* Aylwin, Justice.

Authorities cited by Respondent. (1)

(1) 5 Cochin pp. 11, 401, 404; Pothier, *de la Propriété*, pp. 251, 252; 4 Co-

SIR JAMES STUART, Baronet, Chief Justice: This is an opposition *à fin de distraire*, by which Respondent, an Opposant, claims under a deed of partition, dated the 27th October, 1846, a certain immoveable in this cause seized. The question raised between Appellant, Plaintiff, and Respondent is as to the validity of a sheriff's title, in a certain cause wherein Ezekiel Hart was Plaintiff, and one Oliver Barker was Defendant, and wherein said Ezekiel Hart, the father of Respondent, became the purchaser of the immoveable property in question. The Opposant claims that property as representing her mother, deceased. A sheriff's title is most important, and ought not to be defeated, save and except in the case of the property having been seized *super non domino et non possidente.* Plaintiff, who has contested this opposition, claims the property by virtue of a title from Barker to Buel, 1803, from Buel to Hickok, 1807, and from Hickok to Defendant, 1847. We are of opinion that in these several sales and transfers there was no tradition, and that Buel and Hickok have had no possession; while we are of opinion that Oliver Barker was in possession at the time the property was sold upon him.

It has been objected that there is no proof of the heirship of the Opposant; this could not be taken advantage of by the general issue; it ought to have been pleaded specially. The sheriff's title must consequently be held good, and the judgment of the court below confirmed.

JUDGMENT in appeal: The court, considering that the land in question in this cause, was, by the sheriff of the district of Three-Rivers, legally seized and taken in execution, under competent authority, and, by said sheriff, adjudged and sold in due form of law, on the 28th day of February, 1814, to the late Ezekiel Hart, who became the purchaser thereof, at the public sale made of the same, by said sheriff; and, considering that, before and at the time of said sheriff's sale, the said land was in a wild and uncultivated state, and was not in the visible or actual possession or occupation of any person as proprietor thereof; and, considering also that there is no evidence in this cause to establish that, after the sale of said land by Oliver Barker to Samuel Buel, on the 23d May, 1803, or after the sale of said land by said Samuel Buel to Samuel Hickok, on the 19th May, 1807, either said Samuel Buel or said Samuel Hickok, became or was in any manner possessed

chin, p. 159; Pothier, *Tr. de la Vente*, Nos. 630, 654; 3 Cochin, p. 401, 8 Toullier, Nos. 148, 150, 156, 161; Pothier, *Obligations*, Nos. 738, 739; 4 Toullier, Nos. 55, 56; 9 Toullier, p. 115, note; Pothier, *Tr. de la propriété*, pp. 293, 324; Voët, Tit. 4, No. 7; Merlin, *Répertoire*, verbo *Tradition*; Lachaise, *Expropriation forcée*, No. 413; Troplong, *Vente*, No. 276; 8 Toullier, Nos. 148, 150.

of said land, under and in pursuance of said last mentioned sales, or either of them, at any time before said sheriff's sale to said Ezekiel Hart, or at the time the same took place; and considering, therefore, that said land was legally seized and taken in execution and sold by said sheriff to said Ezekiel Hart, as being the land of said Oliver Barker, and considering that the right of property in said land thus acquired by said Ezekiel Hart, hath passed from him and became vested in said Harriet Hart, under and by virtue of the deed of partition in the opposition *à fin d'annuler* of said Harriet Hart, in this cause, in the court below, filed, mentioned; and considering, therefore, that said opposition of said Harriet Hart was and is well founded, and that, in the maintaining of the same, by the court below, there is no error; it is adjudged, that the judgment appealed from, be and the same is hereby, in all things, affirmed. (2 *D. T. B. C.*, p. 345.)

ROBERTSON, A. and G., for Appellant.

STUART, H., for Respondent.

TUTELLE.—MINORITE.

COUR DE CIRCUIT, Québec, 30 juillet 1852.

Présent : DUVAL, Juge.

PETIT *vs.* BÉCHETTE.

Jugé : Qu'un père ne peut porter une action pour son fils mineur comme son tuteur naturel, ni maintenir sa propre action, s'il l'a jointe à celle portée pour son fils en telle qualité.

L'action était portée par le Demandeur, tant en son nom que comme tuteur naturel de son fils mineur, en dommages, pour assaut et faux emprisonnement, par le Défendeur, sur le fils mineur du Demandeur.

Le Défendeur plaida, par une exception à la forme, que le Demandeur ne pouvait porter l'action pour son fils comme son tuteur naturel, qu'il devait se faire nommer tuteur en justice, et qu'il ne pouvait exercer l'action qu'il avait en son nom avec celle de son fils, en qualité de tuteur naturel de ce dernier. PER CURIAM : Le père ne peut porter l'action pour son fils mineur, comme tuteur naturel de son enfant. Dans notre système, il n'y a que des tutelles datives. Quant à l'action qu'il a en son nom, elle ne peut être maintenue en la présente cause, parce qu'il l'a jointe à celle qu'il a portée erronément en qualité de tuteur naturel, car il serait impossible de distinguer quant aux dommages dus à l'un et à l'autre.

L'exception à la forme est maintenue, et l'action débcutée. (2 *D. T. B. C.*, p. 367.)

TESSIER et TESSIER, pour le Demandeur.

LELIÈVRE et ANGERS, pour le Défendeur.

ENQUETE.—PREUVE.

SUPERIOR COURT, Quebec, 20 juillet 1852.

Before DUVAL and MEREDITH, Justices.

KELLY, Plaintiff, *vs.* FRASER, Defendant, *and* DIVERS, Opposants.

Une contestation liée entre deux Opposants dans une cause est une contestation distincte quant à tels Opposants.

Toute preuve écrite, ayant rapport à telle contestation, doit être produite par les Opposants, et il ne suffit pas que tels documents aient déjà été produits par d'autres parties dans la cause.

Jellard and Connolly were both Opposants *à fin de conserver.* The latter contested the opposition of the former. In his plea of temporary exception *péremptoire en droit,* he alleged three several notarial deeds on which his contestation was founded; one only of these was filed with his plea, the other two were alleged to have been already filed of record in the cause by other Opposants.

A demand of answer to plea having been made, and no issue having been joined within the delay required, Jellard was foreclosed by Connolly from the right of anwering the plea, and the latter obtained a rule *Nisi* to dismiss the opposition of the former. Thereupon Jellard moved to strike the foreclosure from the files, as the two deeds in question had not been filed by Connolly with his plea, as required by the Rules of Practice (Rule 24), and that, in consequence, Jellard was not yet bound to answer (Rule 26).

Judgement granting Jellard's motion; Connolly's rule discharged; the court observing that the contestation was a distinct issue between Opposants, and could not be supported by evidence adduced between other parties. (2 *D. T. B. C.*, p. 368.)

O'FARRELL, for Connolly.

POPE, for Jellard.

DROIT CIVIL.—TERRES TENUES EN FRANC ET COMMUN SOCCAGE.—PRESCRIPTION.

SUPERIOR COURT, Montreal, 26 mars 1851.

Before SMITH, VANFELSON and MONDELET, Justices.

SIR JAMES STUART, Bart., et ux., *vs.* BOWMAN.

Jugé: 1. Que le droit civil anglais n'a pas été introduit dans le Bas-Canada par la proclamation de 1763, ni par l'Acte Impérial (l'Acte de Québec) de 1774; 2. que par l'Acte Impérial de la 6e Geo. IV, ch. LIX les lois anglaises n'ont été introduites dans le Bas-Canada, par rapport aux terres tenues en franc et commun soccage, que dans les cas où il s'agit de ventes, ou cessions, successions ou douaires; 3. que pour obtenir un titre valable quant aux propriétés immobilières il faut qu'il y ait tradition réelle; 4. que pour acquérir au moyen de la prescription, sous l'empire du droit français, la possession naturelle est nécessaire.

This was a petitory action, brought by Plaintiffs against Defendant, to recover the possession of two lots of land (Nos. 11 and 12, in the second range of lots in the township of Buckingham, in the district of Montreal), with the rents, issues and profits thereof.

The action was instituted in February, 1835; the declaration of the Plaintiffs contains 12 counts, and sets forth the title of Plaintiffs in a variety of forms to meet the law of the case, whether the question is to be determined by the English law or the French law.

The facts of the case, as detailed in the declaration, may be stated as follows: That, on the 29th May, 1799, by letters patent, under the great seal of the Province, His Majesty, Geo. III, granted to John Robertson, several tracts or parcels of land containing together about 2000 acres of land, situate in the township of Buckingham, in the district of Montreal, being lots Nos. 9, 10, 11, 13, 14, in the first range of lots, and the Nos. 9, 11, 12, 13 and 15, in the second range of lots, to be holden in free and common soccage; That John Robertson entered into possession and so remained, until the 15th October, 1804, on which day, a sale thereof was made before Chaboillez and colleague, notaries, by Catherine Christie, the wife of John Robertson, and one William Martin, as the joint attorneys of John Robertson, duly authorized thereto by power and attorney, bearing date the 5th day of April, 1800; that the sale so made was made to Patrick Robertson, a brother of John Robertson and to Francis DesRivières in his quality of tutor to certain minor children therein named, to wit, Elizabeth Robertson and Catherine Robertson, for and in consideration of the sum of £833 6 8, current money of the Province; That said minor children, so represented by said Francis DesRivières, their

tutor, were the children of Alexander Robertson (also a brother of John Robertson and Patrick Robertson),and Mary McPherson, his wife, and were the co-heiresses of said Alexander Robertson; that, by this deed of sale, said Patrick, and the children and co-heiresses of said Alexander Robertson, represented by their tutor aforesaid, became the owners and proprietors of the said 2000 acres of land, and held and enjoyed the same; that Patrick Robertson on the 16th March, 1808, died, and said Elizabeth and Catherine Ann survived him. That Catherine Ann died, on the 18th January, 1814, and that Elizabeth Robertson, the sole survivor, afterwards married James Stuart on the 14th March, 1818; that, when Patrick Robertson died, on the 16th March, 1808 he left one Niel Robertson, his eldest brother, his heir at law, who afterwards died, on the 18th June, 1813, leaving an only daughter, Elizabeth Ann Robertson, who died on the 6th August, 1823; That John Robertson, the original patentee from the crown, died in Jamaica, in the West Indies, in 1815.

The title of Plaintiffs, arising out of these facts, is set out in the declaration in the first count. That, by the sale from John Robertson, by the ministry of Catherine Christie, his wife, and William Martin, as his duly authorized attorneys, to Patrick Robertson, and Francis DesRivières, in his quality of tutor to the minor children, Elizabeth and Catherine Ann Robertson, children of Alexander Robertson and Mary McPherson, his wife said Patrick and Elizabeth, and Catherine Ann became and were joint tenants of said 2000 acres of land, each for one half; that, by the death of Patrick and the survivorship of Elizabeth and Catherine Ann, the latter became jointly, as such survivors, the owners and proprietors of the whole 2000 acres of land, and the entire tenancy vested in them; and that, by the subsequent death of Catherine Ann, the entire tenancy of the said 2000 acres of land vested in Elizabeth Robertson, as sole survivor.

This is substantially the title set up by the first count of the declaration, by which said Elizabeth Robertson claims the entire property in the 2000 acres, as sole survivor of the original purchasers of the land, from John Robertson, which purchase operated as a conveyance by joint tenancy, and that, by the law of the land, applicable to such cases, Elizabeth Robertson, as sole survivor of the joint tenants, became legally seized, in her own right, of the entire 2000 acres.

The title of the Elizabeth Robertson secondly invoked and set out in the 2nd count of the declaration is deducible in a different way, and based on principles of law different from those invoked in the first count, and is as follows: that by virtue of the sale by John Robertson, by his attorneys to

Patrick Robertson and Francis DesRivières, tutor as aforesaid to Elizabeth and Catherine Ann, children Alexander Robertson, they, the said Patrick and the said minor children, became possessed and were seized of said land, as tenants *par indivis*, each for one half, that is to say, Patrick for one half or two fourths, and Elizabeth and Catherine Ann, for one half, or each for an undivided one fourth share; that, by the death of Patrick without issue, his estate in the said undivided half passed and descended to his eldest brother, Niel Robertson, who became seized thereof in his own right; that, by the death of Niel, the said two undivided fourth shares passed and descended to Elizabeth Ann Robertson, his only daughter and heiress, and that, by the death of Elizabeth Ann Robertson, on the 6th August, 1823, without issue, the said two undivided fourth shares passed and descended to her cousin Elizabeth Robertson, as the eldest and only surviving daughter of Alexander Robertson, the brother of Niel Robertson: That Elizabeth Robertson, thereby became possessed and seized, as in her own right, of three of the undivided fourth shares of the said 2000 acres, and that, by the death of Catherine Ann, her sister, the one undivided fourth share, so belonging to said Catherine Ann, passed and descended to Elizabeth, as sole heiress at law of Catherine Ann, she having died without issue, whereby Elizabeth Robertson became possessed and seized, in her own right, as proprietor, of the entire 2000 acres of land.

The title thus invoked is traced down to Elizabeth Robertson, assuming that, by the purchase aforesaid, Patrick and Elizabeth, and Catherine Ann, became tenants *par indivis* of the 2000 acres, and that, as regards the one undivided half or two fourths so acquired by Patrick, the said two fouth shares passed, by inheritance, to Elizabeth Robertson, as sole heiress at law to Patrick, the original co-purchaser, by regular descent, and to the one fourth share of Catherine Ann, as her sole heiress at law.

The third count of the declaration sets out the case as in the second count, with this difference solely, that supposing, by the purchase aforesaid, Patrick Robertson and Elizabeth and Catherine Ann Robertson acquired as tenants *par indivis* for one third each, and not as stated in the second count, that is Patrick for two fourths, and Elizabeth and Catherine Ann for one fourth each, that by the same course of descent and inheritance the one third share vested in Elizabeth as sole heiress at law to Patrick, her uncle, and as sole heiress of Catherine Ann, her sister, in the same manner as if they had acquired by one fourth shares, as stated in the second count.

The fourth count alleges a title in Plaintiffs, founded on a

prescription of 20 years by them Plaintiffs, and by all those whose estate Plaintiffs now claim, without interruption, and in good faith.

The fifth count sets up the same title by prescription by a continued and uninterrupted possession of 20 years, but alleges the possession to have been in the Plaintiffs, generally, without reference to those from whom and through whom they acquired.

The sixth count sets up a title by prescription by means of a continued and uninterrupted possession of 30 years, in good faith, by Plaintiffs, and by those whose estate they now have and claim.

The seventh count sets up a title in Plaintiffs by prescription founded on a possesion of 10 years, openly, publicly, peaceably, without trouble or molestation, and in good faith, with just title *entre âgés et non privilégiés.*

The eighth count sets out the same title by prescription, founded on a possession of 10 years with title, but alleging the possession to have been in Plaintiffs, and all those whose estate they now have and claim.

The ninth count sets up a title by prescription, founded on a possession of 20 years by Plaintiffs and their predecessors, openly, publicly, peaceably, and without trouble or molestation, in good faith, and with just title, as between Plaintiffs and their predecessors, and *entre âgés et non privilégiés.*

The tenth count sets up the same title by prescription, founded on a possession of 20 years, but alleges the possession to have beeen in Plaintiffs generally, without reference to their predecessors.

The eleventh count sets up a title in Plaintiffs by prescription by reason of a possession of 30 years, *continuellement, franchement, publiquement, et sans aucune inquiétation.*

The Plaintiffs then allege the fraudulent possession and detention by the Defendant of lots Nos. 11 and 12, situate in the second range in the Township of Buckingham, containing 400 acres in superficies, and of his fraudulent and tortious entry thereupon, on the 2nd August, 1833, and his refusal to deliver up the same, and of his drawing the rents, issues and profits thereof, and of damage by cutting timber, of £2000: and then follow the usual conclusions as in a petitory action.

The only portions of Defendant's pleadings which it is necessary to notice, are the peremptory exceptions which were pleaded as his 15th, 17th and 19th pleas to the action, and the general denegation.

The first of these exceptions alleges that, on the 2nd August, 1833, Catherine Christie, widow of John Robertson, being

commune en biens with him, possessed, as proprietor of 3/6, and her three daughters, Catherine Margaret, Mary and Amelia, the first of whom was married to Philip Anglin, being as heirs of their father seized, as proprietors, of the remaining three sixths, sold the lots in question to Defendant with a promise of warranty, for the sum of £400 which was paid ; that the deed given to Defendant by Mrs. Robertson, and her daughters, was registered at Hull, in the County of Ottawa, and that, under this deed, he continued publicly, peaceably, without interruption and in good faith, to hold and possess said two lots of land, as the proprietor thereof, until the time of the institution of the action ; that neither Plaintiffs, nor any of the persons whose estate they pretend to have, ever entered upon, or took or had possession of said lots of land, either under the pretended deed of sale by John Robertson and Francis Des-Rivières, or by any other, and that, he (the Defendant), being in possession of the property in good faith under a registered title, cannot be deprived of his right thereto.

The 17th exception sets forth, " That, by the Provincial Statute, 10th and 11th Geo. IV, chap. VIII, it was enacted, " that all acts or deeds in law, or instruments in writing, " which may convey, alienate, bind or affect, any immoveable " property held in free and common soccage, or otherwise, " within the counties of Drummond, Sherbrooke, Stanstead, " Shefford and Missiskoui, shall be duly enregistered, and that " no such act, or deed in law, or instrument in writing, shall " be binding or have any force or effect as a transfer, con- " veyance, mortgage, *hypothèque*, or incumbrance, until the " same shall have been so duly enregistered, " which said provisions were afterwards, by another Provincial Statute, 1st. Wm. IV, chap. III, extended to all such lands and other immoveable property as, at the time of the last mentioned Act, were, or thereafter should be, held in free and common soccage in the counties of Ottawa, Beauharnois and Megantic. That said two lots of land, were, at the time of the passing of said last mentioned statute, held in free and common soccage in said county of Ottawa; That said Defendant, in pursuance thereof, on the 15th August, 1833, caused said deed of the 2nd August, 1833, to be registered at the Registry office for the county of Ottawa established under and by virtue of said statutes; That, by the last mentioned statute, 1st. Wm. IV, chap. III, it was further enacted that, from and after the passing of that statute, " no act or deed in law, or instrument in " writing, by which a mortgage or *hypothèque* has been or is " created, shall bind or affect, as a mortgage, incumbrance or " *hypothèque*, nor shall any act, deed or instrument in law, " operate or bind, as a conveyance, any land or immoveable

" property situate within any of the said counties of Ottawa, " Beauharnois and Megantic, save all such land or immoveable " property as is or may be held *à titre de fief* within the same, " unless the said act, deed or instrument in law, be enregis- " tered in the registry office for the county in which the said " land or immoveable property is situate, within one year from " and after the passing of this act; " that said two lots of land were and are holden in the said county of Ottawa in free and common soccage, and not *à titre de fief*, and that Plaintiffs had not caused said deed of sale of the 15th October, 1804, to be registered according to said statutes.

By the 19th plea, Defendant claims to be paid the value of his ameliorations, in the event of judgment being rendered against him.

The answers pleaded by the Plaintiffs to these peremptory exceptions are: That Catherine Christie and her daughters were not, and Plaintiffs were, seized and possessed, as proprietors, of said two lots at the time of the date of the deeds of sale by the former to Defendant, therefore they could not lawfully sell; That said Sir James Stuart " by reason of his being in the service of His (late) Majesty, and in the fulfilment of his duty as a public officer, was constrained, and Elizabeth Robertson, to depart from Lower Canada, on the 1st of May, 1831, and James Stuart was compelled to remain absent from the Province, in parts beyond the seas, till the third October, 1831; " That Defendant and Catherine Christie, Philip Anglin and Catherine Margaret Robertson, Mary Robertson and Amelia Robertson, taking advantage of the absence of Plaintiffs, conspired together to cheat and defraud them and agreed that they should pretend to be the proprietors of said two lots and that, for certain colorable consideration for the land, should, by a deed of sale, convey said lots to Defendant, and should procure such deed of sale, so fraudulently obtained, to be registered in the office of registration for the county of Ottawa; That said deed of sale is therefore null and void; That Defendant obtained his deed from widow Robertson, and her family, for a *corrupt consideration greatly below the real value* of the land; That, at the time when the deed of sale pleaded by Defendant was executed, he and his vendors well knew that Plaintiffs were seized and possessed, as proprietors, of the lots of land in question; That Plaintiffs were compelled to leave Lower Canada for the service of the State, and that within five weeks after the return of James Stuart, the deed of sale bearing date the 15th day of October, 1804, under which the Plaintiffs claim, was registered; That, before and at the time of the execution of the deed of sale in favor of Defendant, and before and at the time of the passing of the Provincial Statute

relative to the establishment of registry offices in the county of Ottawa, and other counties, Elizabeth Robertson was proprietor of the lots of land, and Plaintiffs, in her right, were seized and possessed thereof; That the deed of sale was obtained by Defendant from Mrs. Robertson, and her family, through fraud and covin, and during the absence of said James Stuart in the fulfilment of his duties as public officer, and is therefore null.

It was contended by Plaintiffs, that by the evidence adduced, the subject in dispute had been narrowed down to one single point, namely whether the title of Defendant, under the registered deed of sale of the 2nd August, 1833, could prevail over the titles on which Plaintiffs' action was grounded, and they contended that this question must necessarily be determined in the negative for the following reasons:

Because the provision requiring the registration of titles to lands, contained in the Provincial Statute, 1 Will. IV, has not been extended to the county of Ottawa. The first registry law passed in Lower Canada was the act 10th and 11th Geo. IV, ch. VIII, which provided for the establishment of registry offices in the counties of Drummond, Sherbrooke, Stanstead, Shefford and Missiskoui. This statute required the registration of *hypothèques* or mortgages within twelve months from its date, and also of all deeds or *instruments* in *writing*, to be *executed* after passing of that statute, by which immoveable property, held in *free and common soccage* in the said *last mentioned* counties might be *alienated* or *affected*. In the following year this statute was amended by the act 1 Will. IV, ch. III. The first section of this last statute repeals the 11th section of the act 10th and 11th Geo. IV, ch. VIII, which required duplicate registers to be kept. The 2nd section required that all deeds or instruments in writing, executed *before* the passing of the act 10th and 11th Geo. IV, ch. VIII, under which persons owning, or claiming to own lands situated in said counties of Drummond, Sherbrooke, Stanstead, Shefford and Missiskoui (except the letters patent of his Majesty), should before 1st May, 1832, be registered in the registry office of the county in which such immoveable property should be situate. The 3rd section enacts, "that all the provisions of the act hereinbefore cited and amended (that is the 10th and 11th Geo. IV, ch. VIII), shall extend to all such lands and other immoveable property as are or shall be hereafter held in free and common soccage in the counties of *Ottawa, Beauharnois* and *Megantic*." This section extends to the county of Ottawa the provisions contained in the 10th and 11th Geo. IV, ch. VIII, but *none other*. But, among these provisions, there is no enactment requiring that deeds execu-

ted *before* the passing of that statute, by which lands were sold or alienated, should be registered: the provision to this effect is that enacted for the first time by the 2nd section of the act 1 Will. IV, ch. III, and this provision has not been extended to the county of Ottawa. That no such extension has been enacted by the Legislature, or has taken place, is also confirmed by the act 2 Will. IV, ch. VII. This act was passed to enlarge the period within which registration might be made, and the enactment it contains is expressed as follows, viz: " That the period assigned and limited by the said *second* " *clause* or *section* of the before mentioned act, passed in the " first year of Her Majesty's reign, chapter the third, for enre- " gistering certain acts or deeds in law, or instruments in " writing in the *said clause* or section mentioned, shall be " and the same is hereby extended to the first day of May, " which will be in the year of our Lord 1833, and that *all* " *such* acts or deeds in law, or instruments in writing in the " said clause or section mentioned, and required to be enre- " gistered, which shall not be enregistered, in the manner " therein provided, before the first day of May, 1833, shall be " utterly void and of no effect whatsoever against subsequent " purchasers for a valuable consideration." By this act, the enlargement of time allowed for registration is expressly limited to the counties mentioned in the *second* section of the act 10th and 11th Geo. IV, ch. VIII, that is to the counties of Drummond, Sherbrooke, Stanstead, Shefford and Missiskoui. The Legislature, therefore, has been perfectly consistent with itself in confining the enlargement of time for enregistration to these last mentioned counties, in which only the registration of old titles was required by the act 10th and 11th Geo. IV, ch. VIII, and by thus confining this enlargement, the Legislature has confirmed the fact that the provision for the registration of old titles to land has not been extended to the county of Ottawa: if it had been, the enlargement of time would also have been extended to that county. There was not, therefore, at the time of the making of the deed of sale from the widow and heirs Robertson to the Defendant, on the 2nd August, 1833, nor was there, at any time before the institution of the action, any law that required the registration of titles to lands *in the county of Ottawa* which were executed prior to the passing of the act 10th and 11th Geo. IV, ch. VIII, registration *in that county* being only required to be made of certain incumbrances and of titles to lands made and executed *subsequently to the passing of the last mentioned statute.*

Because, the provision contained in the 2nd section of the statute 1 Will. IV, chap. III, by which the registration of *all*

pre-existing titles to lands in certain counties, within the extremely short space of one year, is required on pain of forfeiture by the owners of their right of property in favor of other persons, without right or legal claim, is an *ex post facto* legislative enactment, subversive of the established rights of property, is inconsistent with the first principles of natural law, reason and justice, and without example in any civilized country, and ought, therefore, to be controlled by the common law, and held to be null and void. (1)

Because the provision of the law in question, if capable of being enforced, is confined to titles derived from *deeds* or *instruments in writing*, of which it prescribes the registration in a particular form ; but it has no relation to and leaves untouched titles to land derived from other and different sources, such as titles acquired by *prescription* or by *descent*. Of these latter titles no registration is required : nor is it possible, under the provisions of the registry acts now referred to, in any manner to register them. Now, the action of Plaintiffs is grounded *not only* on a *deed* or *instrument in writing, but also* on titles by *prescription* and *descent*.

Because, if a provision of law, requiring the registration of their title, were applicable to Plaintiffs, they laboured under a disability which precluded them from complying with any such provision. They were constrained to leave Lower Canada in May, 1831, *before* the publication of the registry law of that year relied on by Defendant, and continued absent from the province, under an entire ignorance that there was any such law, till after the period within which registration was required to be made had elapsed. But, within five weeks after the return of said James Stuart, one of Plaintiffs, in 1834, the written title mentioned and recited in Plaintiffs' declaration, was registered. It is therefore conceived that during this disability the statute in question could not be held to be applicable to them.

Because, Elizabeth Robertson, to whom the land in question belongs, at the time the registry law referred to was passed, being a married woman, was disabled, by reason of coverture, from complying with the injunction of the Legislature by registering her title as required.

(1) Vide Bohham's Case, 8 Coke's Rep., 116 ; Hobart's Rep., pp. 85, 86 and 87, Day *vs.* Savage ; 10 Mod. Rep., 115 ; 12 Mod. Rep., p. 687, City of London *vs.* Wood ; 2 Dwarris, 642, 643 ; Fonbl. on Eq. 23 ; Rep. de Mer., *verbo* effet rétroactif, pp. 533, 534, 535, 536, 564, 604, 605 ; 1 Kent, pp. 423, 381 ; Code Civil, art. 2, Prelim. as to inscriptions. Vide, as to *prospective* nature of registry acts in England, 2 Ann, ch. IV ; 5 Ann, ch. XXXV ; 7 Ann, ch. XX ; in Ireland, 6 Ann, ch. II ; in the West Indies, Grenada laws, p. 8 ; in Upper Canada, 35 Geo. III, ch. V ; in the other British Colonies, 2 Burge, 829 ; in France, law of 11 Brumaire, an 7 ; in the United States, 4 Kent, 161, 162, 163.

Because the provision of the act 10th & 11th Geo. IV, chap. VIII, requiring the registration of titles to lands, is applicable to cases where the grantees, under registered and unregistered titles, derive their rights from the same grantor, not where they derive their rights from different grantors as in this case.

Because Defendant is proved, to have had notice of Plaintiffs' title before he purchased the lands in question.

Because Defendant's title, and the registration of it, originated and were concocted in a fraudulent conspiracy, between the grantors and himself, to cheat and defraud Plaintiffs of the land by the giving and taking for a *sham price* a pretended title, which both parties knew to be worthless, merely for the purpose of registering it, in order thereby to defeat and destroy as they expected, the title of Plaintiffs, which they knew to be unregistered in consequence of their absence from the country.

SMITH, Justice, dissenting: By the pleadings, the following issues have been raised:

1. The validity of Plaintiffs' title; 2 The validity of Defendant's title from Mrs. Robertson and her daughters, consequent upon good faith and registration, and its prevailing over Plaintiffs: in consequence of possession following; 3. That this title is a bar to the action; 4. That Plaintiffs' title is absolutely null, in consequence of the operation of the registry acts, the title in question not having been registered under the provisions of those laws; 5. That Catherine Christie and her daughters were strangers to the property, and could convey no legal title, and that consequently the registration of a deed from them is valueless, and can have no effect; 6. That Defendant's title is bad, by reason of fraud; 7. That registration by Plaintiffs, within five weeks of their return to the Province, is sufficient to preserve their title; 8. That Eliz. Robertson, the wife of James Stuart, being at the time of the passing of the 10th and 11th Geo. IV, and 1 Will. IV, under coverture, said law cannot affect her rights; 9. That there is fraud on the part of Defendant; 10. Whether compensation for betterments is to be given to a party, who has fraudulent possession, and is in bad faith?

Plaintiffs urge a title; Defendant urges another title, with registration, and he sets forth the invalidity of Plaintiffs' title for want of registration; and Plaintiffs meet Defendant's allegation of title, by alleging it to be a fraudulent one, and consequently null. Plaintiffs' title has been alleged by various counts as subsisting under both the English and French systems of law. It is, therefore, first necessary for the court to decide what the law is, which is in force in the county of Ottawa, in respect to lands held in free and common soccage.

It is a principle laid down by the best authorities and universally recognized, that were a country is obtained by conquest or treaty, the King possesses an exclusive prerogative power over it, and may modify and alter the laws existing in the country at the time; but, in England, this right is subject to the control and revision of Parliament. It is also well settled that the King, in making these changes, cannot violate any articles of capitulation, which may have been assented to in favor of the conquered, and that these articles are sacred. In applying these incontrovertible rules to the case of Canada, upon reference to the articles of capitulation, it will be found that when the Marquis de Vaudreuil asked the British General to promise the maintainance of the inhabitants in their ancient laws and customs, the reply was, that they became subjects of His Majesty, and must await the expression of the King's plea sure in that respect.

The first intimation of this pleasure was contained in the proclamation of 1763, in which it was declared that His Majesty's subjects in the then Province of Quebec, should be maintained in the enjoyment of the laws of England. This, it has been held, has never been carried out, and was a mere declaration of intention. But, on the other hand, this has been contradicted by the establishment of Courts of Justice, which are ordered to administer justice and equity, as nearly as may be, in conformity with the laws of England. After the establishment of these jurisdictions, political difficulties arose; some of the judges administered the English law, others such law as they saw fit. Hence arose a difference concerning the interpretation of the proclamation. But Courts of Justice have nothing to do with these difficulties between political parties. If the crown had the right to make such a declaration as that contained in the proclamation, and its intention to introduce the English law, was thereby made distinctly manifest, we have nothing to do but to carry that intention into effect. These matters were maturely weighed and considered, during the debates upon the Quebec Act of 1774. Do we not find in that act a sufficiently distinct recognition of that intention; and if it was so endorsed by the authority of parliament, must it not be held to be binding? We find it enacted in the fourth section of that act, "that whereas the provisions of the said proclamation in respect of the civil government of the said Province of Quebec, &c., have been found, upon experience, to be inapplicable to the state and circumstances of the said province, the inhabitants whereof amounted at the conquest to above 65,000 persons, professing the religion of the Church of Rome, and *enjoying an established form of constitution and system of laws* by which their persons and property had

been protected, governed and ordered for a long series of years, &c.," it was, therefore, so far as related to the civil government and administration of justice in the province, &c., revoked, annulled and made void, from and after the 1st May, 1775. Could this act have formally abrogated that which had never subsisted? Was not the intention of the crown, and the acquiescence of the parliament up to this period made manifest by this act? It did not declare it to have been null, but annulled it from and after a certain date. The mere effect of our becoming subjects of the Sovereign of Great Britain, renders us subject also to the proclamation, issued by his privy council, up to the time that parliament saw fit to interfere, and this act, by its terms, maintained what had been done by virtue of that proclamation, only annulling it for the future. By the eighth section, the right to hold property by Canadian subjects under the old tenure is conceded, "as if said proclamations, &c., had not been made," &c., further ordering, that, for the decision of matters in dispute, relative to property and civil rights, recourse shall be had to the laws of Canada. The Imperial Parliament plainly held, then, that it required a distinct enactment on their part to re-convey to the Canadians their rights to the administration of the French system of laws, which they must consequently have held to have been formerly taken away by the capitulation and proclamation. Then, on reference to the 9th section, which is framed in the form of a proviso, we find it enacted, that "nothing in this act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, his heirs and successors, to be holden in free and common soccage." If this proviso, instead of extending to the fourth section, and other portions of the act, as its terms would imply, only extended as a proviso to limit the enactment contained in the 8th (the next preceeding section), it nevertheless formally declared by the enactement contained in it, that recourse should be had, in the cases named, to the laws heretofore in force in Canada, and should not apply to lands granted in free and common soccage. Can it be maintained, in the face of these declarations and enactments, that the old system of laws was to be applied, as well to the vast extent of territory, both in what is now Upper Canada, and in the townships of Lower Canada then known as the waste lands of the crown, as to the old territory already occupied by the French Canadian inhabitants? Clearly not. Some difficulty arose about the extent of the application of this proviso, it being contended, that as no other part of the act but the next preceding 8th section referred to lands, this section only referred to it, and its force being held by some to be very limited,

the differences between the parties gave rise to the passing of the tenures act, 6 Geo IV, ch. CXIX, by the Imperial Parliament. In all the fierce struggles which ensued between contending political parties in the province, the abstract right of the Imperial Parliament, to legislate upon this point, has never, to my knowledge, been disputed. This is conclusive proof, that the right was recognized, and it undoubtedly exists. This act recognises the declarations of the proclamation, and confirms the provisions of the Quebec act in this regard, but at the same time limits it. The eighth section of that act is as follows: "That all lands within the said Province of Lower Canada, which have heretofore been granted by His Majesty, &c., to be holden in free and common soccage, or which shall or may hereafter be so granted, &c., may and shall be, &c., held, granted, bargained, sold, alienated, conveyed, and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the laws of England established and in force in reference to grants, &c., descent, &c., or to the dower and rights of married women." Could language be stronger than this? If the power be admitted to have existed in the Imperial Parliament to pass this law (and it has always been admitted), this must be conclusive upon the point. But the Provincial Parliament has itself acquiesced in and confirmed this enactment, at the same time that they in some degree modified it by the act of 1829. Whether this statute has the force of law or not, it is still a formal recognition of the right of the Imperial Parliament, and this concurrence of the colonial legislature should remove every doubt which might previously have existed upon that point. I do not hesitate to declare my opinion, that it was in force as law, although it did not receive the royal assent within the two years mentioned in the Quebec Act. The law officers of the crown have held, indeed, that it required a special act of parliament to enable the crown to assent to it, after that period had elapsed, and it has been assented to with the additional rights which such an act could confer. The case of the withheld consent to a contract, for the limited space of time, is widely different from this. The provision of the two years' limit, within which the crown may assent, is made in favor of the crown. The continuance of the act before the sovereign for this consent, is a sufficient mark of the continuance of the consent, of the colony, to which the crown can therefore validly add its consent at any time, so long as the act is not withdrawn. I am of opinion then, that the English law, with the restrictions contained in the last named statute, is in force in respect of township lands.

How then is the law to be applied in this case? The title set up by Plaintiffs in their first count, is a title in Patrick

Robertson and the minors, his nieces, by joint tenancy, governed by the peculiar principles of the English law. It is subject to the right of survivorship. A positive title by survivorship has been made out in Plaintiff, Elizabeth Robertson, which cannot by any possibility be shaken, if the act of 1829 is the law of the land. The transfer was made by a valid instrument according to the English law, and carried with it a right of survivorship. Under the first count the title is unquestionable. The title, *par indivis*, set forth by the second and third counts, is also a good one under the act of 1829, and it has, by descent come to be legally vested in Plaintiffs. The next form of title to be noticed is that of the English prescription, which however I will waive, consenting for the present to the doctrine (of which I am by no means convinced) that that form of acquisition has not been introduced here; the English law only having force in matters of conveyance, descent or inheritance, and dower. Coming next to the 30 years' prescription of the French law, I will notice it, for the purpose of considering the question of *seizin*, upon which, it seems to me, the whole case turns. Non-delivery by John Robertson or his attorneys, and non-seizin by Plaintiffs has been alleged. I may notice here also two technical objections to the validity of the deed to Patrick Robertson, etc., which have been urged by Defendant's counsel. These are, that it is not intended or enrolled. These objections which I think of no weight, are sufficiently answered by the terms that justice is to be administered "as nearly as possible" according to the law of Egland. The state of the country has been such as to render it in many cases quite impossible to comply with such formalities, and a mere quit-claim deed has been received as a title, both in Upper Canada and here. With regard to another objection, that the form of action is not the English one, it has always been held, that the form of remedy is to be decided by the place where the action is instituted. The right exists here to bring a petitory action, and such an action has been brought.

Coming then to the question of possession it may be viewed in a two-fold light, and first without reference to the registry law. Did there pass, by means of the conveyance of 1804, any delivery of the property, such as would constitute livery of seizin under the English law? It is a principle in law that before a person can exercise the right of revendication, there must have been vested in him an actual *dominium*, not a mere abstract right of property. The acquisition of this *dominium* may be made out in one way, where there is no adverse possession, but in a different way when there is such adverse possession. Under the law *quoties*, if one party

acquired without getting possession, and another subsequently acquired and got possession, the latter would hold the property, notwithstanding that his title was subsequent to the other. But it is here pressupposed, that the common *auteur* retained possession himself after the first sale, and while actually in possession effected the second sale. (1) In this case, at the time of the passing of the deed of sale, there was a delivery of the letters patent (the vendor's title), and a diagram of the property, and this delivery was mentioned in the deed, coupled with as strong terms of disseizin and abandonment, on the part of the vendor, as could be used. This is the turning point of the case. Unless Defendant can shew his title to come as far as this, Plaintiffs' claim must be maintained. The transfer of title has been held to be a sufficiently symbolical delivery, and such a delivery has taken place in this instance. Under the Coutume d'Orléans, it has been held that the simple clause of seizin and disseizin was sufficient. At all events, after such an abandonment of the property by John Robertson, it could never become re-invested in his estate by any possibility, without a retransfer of it. (2) But, if, according to the opinion of the majority of the court, a real possession was necessary, we have proof of such a possession by the witness Dunning, who stated that he held possession under Plaintiffs for a long time. We have besides the continued possession of Sutherland, curator to the estate of Patrick Robertson, through persons to whom he gave liberty to cut timber, and from whom he had derived profits upon the sale of it. The possession by both these people inured to Plaintiffs in my opinion, though that of the curator was held to be an interruption, by the majority of the court. In examining Defendant's title, it was found to be derived from the widow of John Robertson, representing her husband, who by her own instrumentality had divested herself of the property, and who afterwards abandoned it altogether and left the country, and died abroad. Whence did she derive her title? She declared by the deed to Defendant, that she was not in possession of the property; and the sale of mere titles is prohibited by law. John Robertson died in 1815, without any right, title, or possession to this property: by what means did it become invested in his succession? And how came his wife, who returned about 1832, entitled to sell it as representing that estate? With regard to the registry laws, they were not made to protect fraud but to guard against it, and to compel those people holding titles, and incumbrances

(1) Pothier, *Dom. de Prop.*, n° 324; Ricard, *Tr. des Donations*, 949.

(2) Pothier, *Dom. de Prop.*, n° 242; Ricard, *Tr. des Donations*, 938 to 948.

in secret, to make them known. That this title was obtained in fraud is manifest from the absence of title in Catherine Christie, and her daughters, and from the knowledge by Bowman, that the title resided in Plaintiffs. This latter fact is proved by almost all of the twenty witnesses produced by Plaintiffs; the majority of whom swear that it was commonly known in that part of the country, that Plaintiffs owned it. Was it likely that Defendant desiring to purchase, should be the only man who did not know who the proprietor was. But several witnesses, among others, Dunning, whose evidence ought not to be rejected, swore positively that Defendant knew of it, as he had mentioned it to him. Plaintiffs' title then being a good one and Defendant's title having been obtained in fraud, I am of opinion, that judgment should go in favor of Plaintiffs.

VANFELSON, Justice: Giving the judgment of the court: I differ from the learned president in the opinion he has expressed, that the English law is in force in the Townships. It is true that the crown has the right, by virtue of its prerogative, to provide for the Government of, and administration of justice in a conquered or ceded country, but, in the silence of the crown upon the point, the laws of the conquering country are not introduced, but those of the conquered people remain in force. Has then the Sovereign of Great Britain introduced the English law? Upon this point our attention has been first directed to the forty-second article of the capitulation, the answer to which leaves the law in abeyance, subject to the future disposal of the Sovereign. The treaty of peace, by which the country was formally ceded, is also silent upon the point. Next in order is the proclamation of 1763. I thought, at the time of the argument, that the English law had been introduced by that proclamation, but, upon further consideration, I now believe that was an erroneous opinion. The terms of the proclamation are by no means sufficiently distinct and formal to be considered as introducing the body of the English law. But, besides the administration of the Government, it was necessary to provide for the disposal of the lands constituting what was called the domain of the crown, and these were to be ceded under free and common soccage, and to be administered by the governor, as in the other colonies, referring undoubtedly to the other North American colonies. There is no inconsistency in introducing several different tenures of land, but there would have been great incongruity in introducing several different and distinct systems of law into the same country, divided, in the extent of their jurisdiction, by the lines which divide the old grants from the new, and requiring them to be administered to the different parties by one and

the same tribunal. It is the Act of 1774, which really raised the difficulty respecting the extent to which the English laws were introduced into Canada. At the time when this was passed it had been found that the species of jurisdictions, which had been established, were inconvenient both to the old settlers and the new. The eighth section of this act has more special reference to the subject of tenures, and gave to the *seigneurs* and others, the same beneficial rights which they had ever enjoyed previous to the dispute concerning the interpretation of the proclamation of 1763. The ninth section, which has been cited, can only be held to refer to this subject, for although it is couched in terms as if meant to apply to all the provisions of the act, yet, it will be found quite impossible to give it that application. It must be held then to be a proviso to the next proceeding section only, and simply to mean that seigniorial and feudal rights shall not affect the lands so newly ceded. To say that the whole body of the English law was to have force in respect to them, would be an absurdity. The court nas next to consider the Imperial Act of 1825 (6 Geo. IV, chap. LIX). I believe that the Imperial Parliament had the right to pass that statute as a declaratory law only. But, by this act, as shewn by the eighth clause, the English law is only introduced, in respect of these lands, in three particulars, viz : conveyance, descent or inheritance and dower ; and I think that the Imperial Parliament has gone very far in this. I believe that the Provincial Act of 1829 has never had force of law, but served as an explanation of the views of the colonial legislature in relation to the question. I conceive it to be manifest, then, that the English law has never been introduced into Lower Canada, except in the three points mentioned by the act of 1825 ; and by that act, and not before, has it been introduced to govern Township lands. I will next pass to the consideration of the Plaintiffs' title. They have produced, to corroborate it, the letters patent to John Robertson, and a deed of sale from Catherine Christie and one Martin, as joint attorneys of John Robertson, to Patrick Robertson and Francis DesRivières, tutor to the minors, children of Alexander Robertson, of whom Plaintiff, Elizabeth Robertson, was one.

The court hold that there has never been a completion of the sale, by a delivery of the property. Even if the principle were admitted, that the Queen's letters patent carry with them livery of seizin (of which the majority of the court are by no means assured), and that, therefore, the property was vested in John Robertson, yet there has never been any delivery, either feigned or real, from John Robertson to Plaintiffs or their *auteurs*. (1) And we hold that this delivery was abso-

(1) 4 Pothier, *Traité du Dom. de Prop.*, No. 286.

lutely necessary to complete the sale. So far as regards the sale therefore, Plaintiffs' pretensions are untenable. With regard to prescription, we are of opinion, for the reasons stated, that the English prescription is not in force here. To acquire a title by prescription under the French law, an absolute physical possession (*possession naturelle*), as well as a civil one is necessary, and this has not been shewn. If there has been any possession, it has been interrupted by that of Sutherland, as curator to the vacant estate of Patrick Robertson. From 1804 to 1808, no sort of possession has been shewn, and from 1808 to 1823, a possession has been shewn in Suthérland, if in any body, though that possession is not such a one as to acquire a title by prescription. If it were, it must be held to have been an adverse one, for the possession of a curator to a vacant estate is not in favor of the heirs at law who have renounced, but in favor of the creditors of the estate. (1) Plaintiffs, then, have entirely failed to make out a title, either by sale or prescription, and the court might, without going any further, dismiss their action, for there is no rule of law which is better established than that, in such cases as this, Plaintiffs must shew a good title, before Defendant, in possession, need defend himself; nor is any thing more strictly in accordance with common sense. I will now make a few observations upon Defendant's case. Defendant has shewn a title, valid upon the face of it, and duly registered. There is no bad faith proved on the part of Bowman. The old men, who have been examined, all swear that the report concerning the proprietorship of this property, known to them as the "Robertson tract," was to the effect, that it was vested in the Robertson heirs some of whom were minors. Mrs. John Robertson (Catherine Christie), came to the country, and professed, in common with her daughters to own the property, and sold it to Bowman. Any rumors about Plaintiffs' right to the property; had come, as they stated, from young Mr. Stuart, since dead. There is no doubt, that registration will not mend a title obtained in bad faith; it requires good faith in the purchaser to make his registration valid. But Bowman having acquired in good faith, and registered his title, he is entitled to say to all persons whose claims have not been registered my title has, by a valid registration, acquired a preference over yours.

MONDELET, juge : Depuis que le Canada appartient à l'empire britannique, les tribunaux de ce pays n'ont jamais été appelés à décider une question d'une aussi haute importance que l'est celle qui se présente ici, je veux dire la grande ques-

(1) Pothier, *Prescrip.*, No. 1, p. 577, 637 et 167 ; 13 *Rép. Jurisp.*, verbo Prescription, p. 301.

tion de savoir si les lois civiles de l'Angleterre ont, à aucune époque, été introduites en cette province.

On comprend sans difficulté, qu'aux termes de la sec. 8e de de l'Act impérial de 1774, communément appelé " Quebec Act," ch. LXXXIII, la cause qui est soumise à cette cour, étant une action en revendication ou pétitoire, doit être jugée d'après les lois françaises, le droit du pays, à moins que les lois anglaises n'aient été introduites en Canada quant aux terres et héritages tenus *en franc et commun soccage.*

Cette action étant une action en revendication (ou pétitoire) de divers lots de terre, situés dans le *Township de Buckingham*, on peut réduire aux suivantes les questions qui en surgissent :

1. Les Demandeurs ont-ils un titre ? 2. S'ils ont un titre, il résulte d'une prescription acquise par une possession de 30 ans, revêtue des qualités requises par la loi ou de prescription plus courte, avec titre et de la manière que le veut la loi ; ou 3. D'un acte ou d'actes translatifs de propriété. 4. Le Défendeur a-t-il un titre ? 5. S'il a un titre, de qui le tient-il ? 6. S'il a un titre, a-t-il acquis un droit irrévocable à la propriété en question, les Demandeurs, dans la supposition où ils auraient un titre, ne l'ayant enregistré qu'après l'enregistrement effectué par le Défendeur.

Il faut donc, avant tout, savoir d'après quel système de lois les droits respectifs des parties doivent être jugés.

Pour bien saisir cette importante question, il faut se reporter à la cession du pays à la couronne d'Angleterre,, en 1763.

En 1759, les armes victorieuses de l'Angleterre soumettent leurs vaillants ennemis, les Français. En 1760, a lieu la capitulation. En 1763, intervient le traité de cession.

L'article 42 de la capitulation du 8 septembre 1760, ne peut assurément pas être invoqué comme une reconnaissance de la part de l'Angleterre, que la Coutume de Paris fût alors, et devînt par la suite, la loi du pays, puisqu'en réponse à la demande de M. de Vaudreuil que " les Français et Canadiens continueront d'être gouvernés suivant la Coutume de Paris, et les lois et usages pour ce pays," le général anglais écrit," répondu par les articles précédents, et particulièrement par le dernier, c'est-à-dire, " ils deviennent sujets du Roi." Ces expressions étaient bien naturelles dans la bouche du général anglais, qui, sans doute, craignait d'assumer une responsabilité aussi grande que l'eût été celle de décider seul cette question ; il soumettait, par cette réponse, le tout à la décision des autorités impériales. Au reste, du silence ou de la réserve du général anglais, il ne pouvait résulter autre chose, sinon que tout était indécis quant à l'objet dont il était question, et, en attendant, les lois du pays demeuraient.

Comme on a recours à des principes que l'on prétend être applicables à l'état d'un pays conquis, il est à propos de réclamer ici contre une habitude qu'on pourrait s'être faite de dire que le Canada a été conquis ; il faut s'entendre.

Il n'y a pas eu une conquête, dans le sens de la conquête de l'Angleterre, par les Normands. Il n'en est pas du roi Geo. III, à qui le roi français céda le Canada, comme de Guillaume le Conquérant, qui prend et retient ce qu'on ne veut pas lui laisser saisir.

Il n'en est non plus du roi d'Angleterre comme de *Cortès* qui se rue sur le Mexique et qui au lieu de l'obtenir par une cession, fait subir à l'infortuné *Montézuma* des humiliations qui le conduirent à une mort prématurée, c'était le moyen le plus expéditif d'en finir.

La position du Canada, lors de la cession, n'a rien d'analogue avec nombre d'autres exemples qu'on pourrait citer. C'est une cession qui a eu lieu, le traité le dit, et en fait foi.

Ainsi, les doctrines extrêmes et souverainement injustes que des politiques exagérés, dans des temps d'absolutisme et de malheurs pour les peuples et leurs libertés, se sont efforcés d'accréditer vis-à-vis des populations conquises, toujours à l'avantage des conquérants, ne sont aucunement applicables aux circonstances du Canada, de 1760 à 1763.

Mais supposons, pour un instant, que le Canada a été conquis dans le sens exagéré que l'ont prétendu certains individus, j'emprunte au procureur général De Grey, et au solliciteur général York, les passages suivants que je lis dans leur rapport à Sa Majesté, du 14 avril 1766 :

" There is not a maxim of the common law more certain than that a conquered people retain their ancient customs, till the conqueror shall declare new laws."

Le droit des gens est là, le *jus gentium*, pour revendiquer ce que des prétentions barbares et infectées des notions rétrécies du moyen âge, mettent en question.

Ecoutons le langage d'hommes d'Etat, et d'hommes de loi, chez qui, l'honneur, le désintéressement national et individuel, la science et le bon sens ont si noblement et si humainement proclamé : c'est le procureur général Thurlow, dans son rapport au roi Geo. III, du 22 janvier 1773.

" The Canadians seem to have been strictly entitled by the *jus gentium* to their property, as they possessed it upon the capitulation and treaty of peace, together with all its qualities and incidents, by tenure or otherwise, and also to their general liberty ; for both which, they were to expect Your Majesty's gracious protection.

It seems a necessary consequence that all those laws, by which that property was created, defined and secured, must

be continued to them. To introduce any other, as Mr. York and Mr. DeGrey emphatically expressed it, tends to confound and subvert rights instead of supporting them."

M. le procureur général Thurlow, envisageant alors la proclamation des droits du souverain, et les droits du souverain sur les pays nouvellement acquis, et fesant voir ce que la justice et l'honneur exigent que l'on fasse à l'égard des habitants de ce pays, aborde une autre question, celle qui autorise le souverain de faire ce qu'exige la nécessité, et alors il s'exprime comme suit :

" Although the foregoing observations should be thought just, as a general idea, yet circumstances may be supposed, under which, it would admit some exceptions and qualifications. The conqueror succeeded to the *sovereignty* in a title at least as full and strong as the conquered can set up to their private rights and ancient usages. Hence would follow every change in the form of government which the conqueror should think *essentially necessary* to establish his sovereign authority, and assure the obedience of his subjects. This might possibly produce some alteration in the laws especially those which relate to crimes against the state, religion. revenue and articles of police and the power of magistracy. But it would also follow, that such a change should not be made without some such actual and cogent necessity which real wisdom could not overlook or neglect, not that ideal necessity which ingenious speculation may always create by possible supposition, remote inference and forced argument not the necessity of assimilating a conquered country in the article of laws and government, to the metropolitan state, or to the older provinces which other accidents attached to the empire, for the sake of creating a harmony and uniformity in the several parts of the empire, unattainable, and, as I think, useless, if it could be obtained : not the necessity of gratifying the unprincipled and impracticable expectations of those few among your Majesty's subjects, who may accidentally resort thither, and expect to find all the different laws of all the different places from which they come, nor according to my simple judgment any species of necessity, which I have heard urged for abolishing the laws and government of Canada."

Ces opinions si saines, ces déclarations si honorables et si franchement faites au roi, par M. le procureur général Thurlow, sont appuyées par les rapports de M. le solliciteur général Wedderburne, du 6 décembre 1772, et sont éloquemment et énergiquement consignées le 14 avril 1766, par M. le procureur général De Grey, et le solliciteur général York, dans leur rapport à Sa Majesté, qui avait précédé les autres.

Il n'en faut pas davantage pour faire voir que la couronne ne pouvait, *seule*, changer les lois du pays en force avant 1759 ; l'Angleterre entière *ne le devait pas*, et il n'est que juste de déclarer ici ma ferme conviction que non seulement le roi, non plus que le Parlement Impérial ne l'ont fait, mais qu'il ne paraît pas même qu'ils aient jamais eu l'intention de le faire.

Nous voici arrivés à l'émanation de la proclamation du 7 octobre 1763.

Il me paraît fort singulier qu'on attribue à ce document, des propriétés que le roi même ne parait pas avoir imaginé qu'il possédât. Qu'y trouve-t-on ?

" And whereas it will greatly contribute to the speedy settling of our said new governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become, inhabitants thereof ; we have thought fit to publish and declare, by this our proclamation, that we have, in the letters patents under our Great Seal of *Great Britain*, by which the said Gouvernments are constituted, given express power and direction to our governors of our said colonies, that so soon as the state and circumstances of the said colonies will admit thereof, they shall with the advice and consent of the members of our said council, summon and call general assemblies within the said governments respectively, in such manner and from as is used and directed, in those colonies and provinces, in *America*, which are under our immediate government ; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people, so to be summoned as aforesaid, to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeably to the laws of *England*, and under such regulations and restrictions as are used in other colonies ; and in the mean time, and until such assemblies can be called as aforesaid, all persons inhabiting in, or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of *England* ; for which purpose, we have given power under out Great Seal to the governors of our said colonies, respectively, to create and contitute, with the advice of our said councils, respectively, courts of judicature and public justice within our said colonies, for the hearing and determining all causes, as well criminal as civil, according to law and Equity, and as near as may be, agreeably to the laws of England, with liberty to all persons, who may think themselves aggrieved by the sentence of such courts, in all civil

cases, to appeal, under the usual limitations and restrictions, to us, in our Privy Council."

Il me paraît évident que cette proclamation du Roi, qui lui ne pouvait seul changer les lois du pays, et qui, probablement n'en a jamais eu l'intention, ne renferme pas même l'expressien du désir de Sa Majesté, que les lois anglaises, je veux dire dans leur ensemble, fussent introduites en Canada; j'y vois, tout au plus, l'expression du désir du Roi, que les tribunaux du Canada jugeassent suivant la loi et l'équité (*according to law and equity*), et autant que faire se pourrait, suivant les lois anglaises (*as near as may be, agreeably to the laws of England*). Il n'est pas permis, en présence d'une phraséologie aussi générale, aussi peu tranchée que celle-là, de violer toutes les règles de la logique, de la raison, de la justice, et de la loi, et assurer, comme on le fait, que les termes sont une déclaration formelle de la part du Roi, que les lois anglaises devenaient et seraient désormais les lois du Canada. Et certes, si le Roi seul en avait l'autorité, ce que je ne puis admettre, et s'il en avait l'intention, le désir et la volonté, qu'y avait-il de plus facile que de le dire ? Depuis quand, les souverains, surtout les conquérants, dans le sens qu'on a si étrangement attribué à la cession du pays, sont-ils si timides, et substituent-ils à l'expression de leur volonté, des termes aussi éloignés de l'opérer, que sont les mots " according to law and equity, and as near as may be agreeably to the laws of England ? " *According to law !* Quelle loi ? *Equity !* cela signifie tout ce que l'on veut, et aussi peu qu'on le désire, *as near as may be, agreeably to the laws of England !* Si on doit juger autant que faire se pourra, suivant les lois anglaises, comment se fait-il qu'elles ont été introduites ? Serait-ce donc pour laisser aux juges la liberté, suivant leurs caprices, de s'y conformer, ou de s'en écarter ? Ainsi donc, non seulement la proclamation de 1763, ne justifie aucunement d'en inférer l'introduction en Canada des lois anglaises, mais elle n'autorise pas même l'induction logique et raisonnable que Sa Majesté Geo. III ait eu l'idée de le faire. Et s'il m'était permis d'anticiper, je dirais de suite, que par l'Acte de 1774 (*Quebec Act*), l'on a législaté dans un sens inverse.

D'ailleurs, la proclamation de 1763, n'était pas bornée à la Province de Québec, qui n'était qu'un des quatre gouvernements qu'elle établissait, je veux dire les deux Florides et la Grenade, en sorte qu'il serait contre toute raison, d'appliquer d'une manière absolue, à la Province de Québec, ce qui, considérant les circonstances, et l'état de société dans ce pays alors, n'était aucunement en rapport avec les choses aux Florides et à la Grenade.

Au reste, l'histoire du temps nous fait connaître ce que l'on pensait alors de cette proclamation.

J'emprunte encore au rapport de M. le procureur-géneral Thurlow, les passages suivants.

" Three very different opinions have been entertained. There are those who think that the law of England, in all its branches, is actually established, and in force in Quebec. They argue that Your Majesty, upon the conquest, had undoubted authority to establish whatever laws should seem fittest in your royal wisdom ; that Your Majesty's proclamation, dated the seventh day of October, 1763, was a repeal of the existing laws, and an establishment of the English laws, in their place, in all parts of the new subjected countries ; that the several commissions to hear and determine by the laws of England, were an actual and authoritative execution of those laws ; and, that this law, as it prevails in the province of New-York and the other colonies, took its commencement in the same way, and now stands on the same authority.

" If Your Majesty should be pleased to adopt this opinion, it seems to afford a full answer to the whole reference, by exhibiting not only a general plan, but a perfect system of civil and criminal justice, as perfect as that which prevails in the rest of Your Majesty's dominion, or, at least, it leads off to questions widely different, touching the expediency of a general change in the established laws of a colony, and touching the authority by which it ought to be made.

" Others are of opinion that the Canadian laws remain unrepealed. They argue that according to the notion of the english law, upon the conquest of a civilized country, the laws remain in force till the conqueror shall have expressly ordained the contrary. They understand the right acquired by conquest to be merely the right of empire, but no to extend beyond that to the liberty and property of individuals, from which they draw this conclusion, that no change ought to be made in the former laws beyond what shall be fairly thought necessary to establish and secure the sovereignty of the conqueror. This idea they think confirmed by the practice of nations and the most approved opinions. *Cum enim omne imperium victis eripitur relinqui illis possunt, circa res privatas et publicas minores suæ leges, suique mores, et magistratus hujus indulgentiæ pars est, avitæ religionis usum victis, nisi persuasis non eripere*, Grot 3, 15, 10. And if this general title to such moderation could be doubted, they look upon it to be a necessary consequence of the capitulation and treaty alluded to before, by which a large grant was made them of their property and personal liberty, which seem to draw after them the laws by which they were created, defined and protected,

and which contain all the idea they have of either. This moderated right of war, flowing from the law of nations and treatise, they think may have some influence upon the interpretation of the public acts above mentioned.

" Though the proclamation of the 7th October, 1763, is conceived in very large terms, generally enough to comprehend the settled countries together with the unsettled, yet the purview of it seems to apply chiefly, if not altogether, to the unsettled, where the laws of England obtain a course till otherwise ordered, for it seems to assume and proceed upon it, as manifest, that the laws of England are already in force, which could not be true of any settled country reduced by conquest. It also recites for its object that, " it will greatly contribute to the *speedy settling* our said new government ; " and, at any rate, they think it too harsh a conclusion to be admitted that such an instrument in the state thereof, not addressed to the Canadians, nor solemnly published among them, nor taking any notice of their laws, much less repealing them, should be holden to abrogate all their former customs and institutions, and establish the English laws in every extent and to every purpose, as it may be thought to do in unsettled countries, which conclusion, however, they know not how to avoid, but by confining it to those countries where no settled form of justice existed before.

" If it be true that the laws of England were not introduced into Canada by this proclamation, they consider the several commissions above mentioned, to hear and determine according to those laws, to be of as little effect, as a commission to New-York to hear and determine according to the laws of Canada.

" Others again, have thought that the effect of the above mentioned proclamation, and the acts that followed upon it, was to introduce the criminal laws of England, and to confirm the civil law of Canada, in this number were two persons of great authority and esteem : Mr. Yorke and Mr. De Grey, then attorney and solicitor general, as I collect from their report of the 14th April, 1766. One great source, they represent, of the disorder supposed to prevail in Canada, was the claim taken at the constructions put upon your Majesty's proclamation of 1763, as if it were Your Majesty's intention, by Your Majesty's judges and officers of that country, at once to abolish all the usages and customs of Canada, with the rough hands of a conqueror, rather than in the true spirit of a lawful sovereign, and not so much to extend the protection and benefit of Your Majesty's English laws to your new subjects, by securing their lives, liberties and properties, with more certainty than in former times, as to impose new, unnecessary and arbitrary

rules, especially in the title to land, and in the modes of descent, alienation and settlement, which tend to confound and subvert rights instead of supporting them.

" There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws. To change at once the laws and manners of a settled country, must be attended with hardships and violence. And, therefore, wise conquerors, having provided for the security of their dominions, proceed gently, and indulge their conquered subjects in all local customs which are in their nature indifferent, and which have been received as rules of property or have obtained the force of laws. It is the more material that this policy should be pursued in Canada, because it is a great and ancient colony, long settled and much cultivated by French subjects who now inhabit it, to the number of eighty or one hundred thousand.

" In criminal cases, whether they be capital offences or misdemeanors, it is highly fitting, so far as may be, that the laws of England should be adopted, in the description and quality of the offences itself, in the manner of proceeding to charge the party, to bail or detain him, to arraign, try, convict or condemn him. This certainty and lenity of the English administration of justice, and the benefits of this constitution, will be more peculiarly and essentially felt by His Majesty's Canadian subjects, in matters of crown law, which touch the life, liberty and property of the subjects, than in the conformity of Your Majesty's courts to the English rules in matters of tenure, or the succession and alienation of real and personal estate. This certainty and this leniency are the benefits intended by Your Majesty's royal proclamation as far as concerns judicature."

Messrs. York et De Grey parlent énergiquement dans le même sens, comme il est facile de s'en convaincre, en référant à leur rapport du 14 avril 1766, dont je m'abstiendrai de faire des extraits, pour éviter des longueurs et les redites. On le trouve au 1er vol. de l'*Histoire du Canada*, par Smith, p. 29, *et seq.*

Telles sont les vues qu'avaient des hommes distingués par leur position et leur mérite, sur le caractère, le but et la portée de la proclamation de 1763.

Il est donc certain qu'en 1763, les lois françaises, c'est-à-dire les lois du pays, étaient dans leur intégralité. De 1763 à 1774, les choses demeurent dans cet état.

Il faudrait donc, pour justifier la prétention qu'on met en avant, relativement aux *townships*, trouver quelque part, l'abolition des lois du pays, quant à une section quelconque de ce pays.

On a avancé que l'Acte impérial de 1774, ch. LXXXIII (le *Quebec Act)* renferme des dispositions qui décident la question: examinons le:

D'abord la sec. 4e, en parlant des habitants du pays, a les termes qui suivent: " And enjoying an established form of constitution, and system of laws by which their persons and property had been protected, governed and ordered for a long series of years, from the first establishment of the said Province of Canada."

Comme on le voit, cette section du statut impérial, est loin d'annoncer un doute sur l'existence des lois du pays, à cette époque; et il s'en faut qu'on y trouve quoi que ce soit qui confirme l'étrange interprétation qu'une arrière-pensée a porté certains hommes de parti en Canada, d'attribuer à la proclamation de 1763:

La sec. 8e est ainsi emphatique que possible, la voici: " And be it further enacted, that all His Majesty's Canadian subjects, within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possession, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial manner, as if the said proclamation, commission, ordinances, and other acts and instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the crown and Parliament of Great Britain; and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same: and all causes that shall hereafter be instituted in any of the courts of justice, to be appointed within and for the said provinces by His Majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreably to the said laws and customs of Canada, until they shall be varied or altered by any ordinance that shall from time to time be passed, in the said province, by the Governor, Lieutenant-Governor, or commander in chief, for the time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in manner hereinafter mentioned."

Cette section a rapport à tous les sujets Canadiens de Sa Majesté, " *All* His Majesty's Canadian subjects *within* the Province of Quebec." Il n'y a d'exception qu'à l'égard des ordres religieux et des communautés, " the religious orders and communities *only* excepted."

D'après quel procédé et quelles règles peut-on faire qu'une section qui parle de *toute* une province et de *tous* ses habitants, dont les ordres religieux et les communautés seuls sont exceptés, n'a rapport et ne s'entendra que d'une section de cette

province, et d'une partie de ses habitants ? La chose est insoutenable ; aussi se rejette-t-on sur le *proviso* qu'on lit en la sec. 9e : "Nothing in this act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, his heirs and successors, to be holden in free and common soccage."

Cette clause est mal exprimée, la phraséologie en est indéfinie ; elle se rapporte à tout l'acte. "Nothing in this act contained, &c."

Si l'intention était de faire rapporter le proviso à la section précédente seulement, il eût été facile de le faire.

Dans la supposition où la cour serait justifiable (ce que je nie) de restreindre à une seule clause, ce qui, en termes exprès, a rapport à l'acte entier, alors la seule portée que l'on puisse raisonnablement attribuer aux termes de ce proviso (sec. 9), c'est que les lois qui ont rapport à la tenure seigneuriale ne s'appliqueront point aux terres concédées, ou à être concédées, *en franc et commun soccage.*

Si les cours prenaient sur elles d'étendre la signification des mots, et de déclarer qu'ils signifient au-delà de ce qu'il est raisonnable de leur attribuer, et cela dans le but de donner suite à ce proviso, alors, il n'y a pas de choix, et il faut, sans balancer, dire, ou que ce proviso affecte tout l'acte, ou que tout ce qui se trouve dans la clause 8e est sans application aux sections du pays, où il y a des terres tenues *en franc et commun soccage.* Si ce proviso affecte tout l'acte, alors, il le détruit, et entre autres conséquences il résulterait :

1° Qu'une loi qui est faite pour *toute* la province, ne s'appliquerait qu'à une partie de la province.

2° Que la section 5e qui garantit le libre exercice de la religion catholique romaine dans la province de Québec, n'aurait aucun effet dans les townships où les terres sont tenues *en franc et commun soccage*, et que là, cette religion ne devrait pas être tolérée.

3° Qu'il en serait ainsi de la section 6e quant à certaines allocations à faire par Sa Majesté, pour le soutien d'un clergé protestant, là où il y aurait des terres tenues *en franc et commun soccage :* conséquence absurde, mais irrésistible.

4° Que, dans les *townships*, les catholiques ne seraient pas tenus de prêter le serment d'allégeance.

5° Que, dans les *townships*, les canadiens n'auraient droit à aucune protection dans leurs droits de citoyens.

6° Que, dans les *townships*, l'aliénation par testament, suivant les lois anglaises, serait impossible et non permise, 10e section.

7° Que les lois criminelles garanties par la section 11e n'auraient point de force dans les *townships.*

8° Que le conseil constitué " pour faire des règlements pour le bonheur et le bon gouvernement de la province de Québec," n'aurait jamais eu le droit de faire ses règlements pour les parties ou sections de la province de Québec, où s'étendait la tenure en *franc et commun soccage,* en sorte que les lois de la législature d'alors n'auraient eu de force que dans les seigneuries.

9° Que les ordonnances du conseil, dont la sec. 14e exige l'envoi dans l'espace de six mois, par le gouverneur, &c., pour être soumise à Sa Majesté, afin d'obtenir son approbation, seraient lois pour les *townships*, sans cette formalité, laquelle serait de rigueur dans les seigneuries.

10° Que les ordonnances concernant la religion, ou autres, par lesquelles il pourrait être infligé une peine plus forte qu'une amende, ou un emprisonnement de trois mois, seraient lois dans les *townships*, du moment de leur promulgation, mais n'auraient aucune force dans les seigneuries jusqu'à ce qu'elles eussent reçu l'approbation de Sa Majesté, comme l'exige la sec. 15e.

11° Que la sec. 17e au sujet de la réserve faite du droit des nominations des juges, établissement des cours de justice, &c., serait inapplicable dans les *townships*, et que là, Sa Majesté n'aurait aucun droit d'établir des cours, juges ou officiers quelconques.

Il s'ensuivrait enfin, 12° que la sec. 18e n'aurait aucune force ou vertu de réserve quant aux *townships* où les lois du Parlement de la Grande-Bretagne, concernant le commerce, &c., seraient sans force.

En voilà, assurément, assez pour faire toucher du doigt a qui veut réfléchir, la parfaite nullité de la section 9e si on la prend telle qu'on la trouve.

Dans la 2 thèse que j'ai posée, il y a au moins de la raison, puisque l'on refuse d'appliquer à la partie seulement, ce que la section même déclare emphatiquement se rapporter au tout. La seule interprétation permise, et elle n'est raisonnable que parce qu'elle ressort de la nature même de l'objet dont il y est question, c'est que ce qui, du droit français, a rapport à la tenure seigneuriale, ne s'applique pas aux terres concédées ou qui le seront en franc et commun soccage.

Il résulte de ce qui précède que l'Acte impérial de 1774, n'a pas pas introduit les lois anglaises dans les townships.

Une observation générale suffira pour le prouver encore plus clairement, s'il est possible. Est-il un homme de loi, en Canada, qui soit disposé à se compromettre au point de dire, que le corps *entier* des lois anglaises a été introduit dans les *townships*. Or, si la sec. 9e de l'acte de 1774 n'a pas eu cet effet, quelle est donc la partie, ou les parties des lois de l'Angleterre, qui a été, ou ont été introduites dans les *townships*.

La question devient, à ce compte-là, encore bien plus compliquée, tellement compliquée, qu'en y réfléchissant tant soit peu, l'on recule devant les conséquences ruineuses qui auraient été la suite d'une anomalie aussi impraticable, et de l'état de choses qui en fût résulté, et contre lequel, les populations des *townships* se seraient élevées, pour demander qu'on substituât quelque chose de certain et d'intelligible, à un amas de règles incohérentes résultant de statuts multipliés, innombrables, contradictoires, sans application, et que les jurisconsultes du pays eux-mêmes ne comprennent pas parfaitement.

Au reste, le jugement que je porte sur l'effet de ces lois, si on les reconnaissait à ce point, ne m'est pas particulier.

" To introduce (disent Messrs. York et De Grey, dans leur rapport au Roi, du 14 avril 1766) at one stroke, the English law of real estate, with English modes of conveyancing, rules of descent, and construction of deeds, must occasion infinite confusion and injustice. British subjects, who purchase lands there, may, and ought to conform to the fixed local rules of property in Canada, as they do in particular parts of the realm, or in the other dominions of the crown."

C'était bien ainsi que l'envisageaient le gouverneur Carleton et son Conseil, comme on peut s'en assurer, par le rapport du 28 avril 1767, qu'ils firent à Sa Majesté, d'après l'ordre qu'ils en avaient reçu.

Et lors de la demande que firent les habitants du Canada à la mère-patrie, d'une forme constitutionnelle de gouvernement, la pétition qu'ils présentèrent, (et comme on le dit, les hommes qui marchaient en tête de ce mouvement étaient d'origine bretonne) renfermait ce qui suit :

" 4. That ancient laws and customs of this country respecting lands and estates, marriage settlements, inheritances and dowers be continued, &c."

Be continued, dirent-ils, non pas *restored*, non plus qu'*introduced*, &c., mais *be continued*, par la raison toute simple que ces lois etaient le droit du pays.

Je crois donc pouvoir dire qu'il ne paraît pas que l'Angleterre ait jamais songé à émettre les prétentions exagérées qui ont vu le jour en Canada, au sujet des lois anglaises. Plus tard, lorsqu'il fut question de diviser en deux la Province de Québec, M. Pitt s'exprima de manière à dissiper, s'il en avait existé, tout doute à ce sujet. Le but du gouvernement anglais était d'assurer la suprématie des lois anglaises dans le Haut-Canada, et celle des lois françaises dans le Bas-Canada, la raison en devait être, entre autres, celle donnée par York et De Grey, dans leur rapport dont j'ai déjà eu occasion de parler plusieurs fois.

" British subjects who purchase land there, may and ought

o submit to the fixed local rules of property in Canada, as they do in particular parts of the realm, or in the other dominions of the crown."

En introduisant le bill dans la chambre des communes, voici comment s'exprime M. Pitt: " The division of the Province into Upper and Lower Canada, he hoped, would put an end to the competition between the old French inhabitants and the new settlers from Britain and the British colonies: this division, he trusted, would be made in such a manner as to give each a great majority in their own particular part, although it could not be expected to draw a complete line of separation. Any *inconveniences* however, to be apprehended from ancient Canadians being included in the one, or British settlers in the other, would be averted by a local legislature to be established in each."

Je ne puis mieux faire, et c'est mon dernier mot sur l'Acte de 1774, que de citer ce qu'en dit l'historien Smith. Je vois, comme le voyait M. Smith, l'Acte de 1774.

" The Quebec Act restored (dit-il à la p. 69, s. 1), the municipal laws of France as to civil rights in Canada, established also the best of all criminal jurisprudence, the criminal laws of England."

Et à la p. 73: " The main scope of the Quebec Act, was to extend the boundary of the Province.....to establish the French laws; to take away the trial by jury in civil cases; to establish the criminal laws of England; and to secure to the catholic clergy their estates and titles."

Pas un mot du proviso de la sec. 9°., au sujet des terres concédées, ou à l'être en franc et commun soccage. Et certes, la chose valait bien la peine qu'on en parlât, et M. Smith n'aurait pas été en défaut, si l'on eût imaginé alors de donner à ce proviso l'étrange interprétation qu'on lui donne aujourd'hui.

Comme depuis l'Acte impérial de 1774 jusqu'à 1826, il n'y a eu, soit en Canada, soit en Angleterre, aucune legislation qui puisse aucunement ébranler l'édifice bien appuyé du système de nos lois civiles, dont l'arbre gigantesque a pris racine à Rome même, dont le tronc s'est étendu sur les Gaules, et dont les branches et le feuillage nous recouvrent, nous arrivons à 1826, époque à laquelle a été passé dans le parlement impérial, l'acte de tenures, 6 Geo. IV, ch. LIX, que l'on prétend être un acte déclaratoire qui a la vertu de trancher toutes les difficultés.

Je suis tellement convaincu que jamais les lois civiles anglaises n'ont été introduites en Canada, j'en trouve la preuve si conclusivement faite par ce qui précède, qu'il m'est impossible d'admettre le doute en cette matière. Je ne puis par conséquent, reconnaître au Parlement impérial le droit d'inter-

venir et entreprendre d'introduire, par l'effet d'une clause intercalée dans un acte législatif en 1826, des lois civiles qui n'ont jamais fait partie de celles qui nous ont régi jusqu'alors.

Le Parlement impérial eût-il le droit de législater sur de tels objets, ce que je répudie sans difficulté, il est impossible, toutefois, qu'il ait la puissance de faire que ce qui n'a jamais été, ait existé, de même que ce qui n'a jamais eu d'existence, en ait eu.

Ne s'aperçoit-on pas, que si, en présence des traités et des capitulations, et d'une déclaration aussi formelle, aussi emphatique, aussi solemnelle que celle que renferme l'acte impérial de 1774, sec. 8e, "And all causes, &c., shall with respect to such property and rights, be determined agreably to the said laws and customs of Canada, *until* they shall be varied or altered, by any ordinances that shall, from time to time, be passed in the said province, by the governor, &c., &c., &." Ne s'aperçoit-on pas, dis-je, que si l'on admettait, pour un instant, la prétention que le parlement impérial a pu constitutionnellement et légalement statuer, comme on dit qu'il l'a fait en 1826, on admettrait par là-même que sous le prétexte qu'on aurait élevé des doutes là où il n'y en avait pas, le Parlement Impérial règlerait, sans appel, et en dernier ressort, ce qui est loi, ce qui l'a été, et déciderait, *ex cathedrâ*, que les lois garanties après avoir été accordées, ne l'ont pas été, qu'on s'est trompé, que l'erreur a donné lieu à cette croyance, et que désormais les lois qu'on pensait notre règle, ne le sont pas, et que tout doit être regardé comme affranchi, par le passé même, de l'effet de ces lois ?

Si j'admettais la légalité de pareille intervention de la part de la législature impériale, ça ne serait, tout au plus, que dans ce qu'elle ferait *prospectivement*, et là même, je ne puis m'incliner en présence d'un corps, qui, tout colossal qu'il soit, ne m'en impose pas encore au point de m'obliger de reconnaître comme légal, ce qui ne serait qu'une assomption de pouvoir, et rien de moins. Je me contenterai d'ajouter que cette partie de l'acte des tenures (sec. 8 de l'Acte imp. 6 Geo. IV, ch. LIX) a été glissée, *assez singulièrement*, dans une loi qui avait pour objet, tout autre chose que d'être un acte déclaratoire, et dont le titre est "An act to provide for the extinction of feudal and seigniorial rights and burthens, on lands held *à titre de fief* and *à titre de cens*, in the Province of Lower Canada, and for the gradual conversion of those tenures into the tenure of free and common soccage, and for other purposes relating to the said Province." La sec. 8e de l'acte 6 Geo. IV, ch. LIX, n'a aucunement porté atteinte à nos lois civiles, il est sous ce rapport, sans aucun effet.

Supposant même que l'acte des tenures ait eu l'effet de

régler conclusivement trois ou plusieurs choses, par exemple, *dower, conveyance and descent*, et que l'acte provincial de 1829 n'ait pas affecté l'acte des tenures (ce qui est le cas, vu qu'il n'a pas été sanctionné dans les deux ans), il ne s'ensuit qu'une chose de deux :

Ou de tout temps, depuis que le pays appartient à l'Angleterre, les lois anglaises ont, dans les *townships*, réglé le *dower, descent and conveyance*, et rien de plus ;

Ou ces lois anglaises ne règlent ces trois objets que depuis la passation de l'acte des tenures, si toutefois l'acte provincial de 1829, n'a pu l'affecter.

Il s'ensuit : que, dans un cas, comme dans l'autre, le corps entier des lois anglaises n'a jamais été introduit dans les *townships*. La forme de *conveyance* serait bien, à la vérité, réglée d'après le droit anglais, mais, une fois l'acte fait, ses conséquences seraient à déduire, et ses effets à mesurer sur le droit du pays. Il en est de cela comme des testaments faits suivant les formes anglaises, les biens se répartissent suivant le droit français, ou si l'on veut, le droit du pays. Mais je désire qu'on me comprenne bien, je ne puis reconnaître au *tenures act*, l'effet d'avoir même, pour les trois objets (*dower, conveyance and descent*), introduit pour le temps passé, les lois anglaises, dans les townships.

Si cela est correct, les actes en vertu desquels les Demandeurs réclament des droits, en cette cause, ne peuvent acquérir plus de force, et avoir plus d'effet qu'ils n'en eussent eu, si cette loi (*tenures act*) n'eût pas été passée par le parlement impérial.

Dans la thèse de l'introduction dans les *townships*, soit du corps entier du droit civil anglais, ou de tout ce qui, du droit anglais, a rapport au *dower, conveyance and descent*, où en serait-on, même dans les *townships ?* Comment pourrait-on jamais administrer tout ce droit ?

Il y avait bien de la vérité dans ce que le juge *Kerr* observa, une fois, dans une séance du conseil législatif, au juge en chef *Sewell*, sur l'impraticabilité d'une telle chose, et sur ce qu'il n'y avait pas un seul juge en Canada, qui fût en état de déclarer qu'il y avait moyen d'administrer de telles lois.

L'acte provincial de 1829 n'affecte pas la question, vu qu'il n'a pas été sanctionné dans les deux ans, d'après l'Acte constitutionnel de 1791. Cet acte fut présenté pour la sanction royale, et réservé le 14 mars 1829. Il ne fut sanctionné par Sa Majesté, en conseil, que le 11 mai 1831. Il fut annoncé par proclamation en Canada le 1er septembre 1831.

Le Parlement impérial, dans sa toute-puissance, qui, dans l'acception familière, n'a de limites que de ne pouvoir faire qu'un homme soit une femme, ne peut pas, non plus, au sérieux,

faire, par le statut 1 Guillaume IV, chap. XX, que ce qui a de fait existé, n'ait pas existé, non plus que ce qui n'a pas existé, ait existé. Or l'Acte constitutionnel de 1791 ayant formellement statué qu'une loi provinciale réservée pour la sanction royale, et qui n'aura pas été sanctionnée dans les deux ans de sa présentation au gouverneur, pour la sanction royale, ne sera pas loi, elle devient une nullité. " And that no such bill, which shall be so reserved as aforesaid, shall have any force or authority within either of the said provinces respectively, unless His Majesty's assent thereto shall have been so signified, as aforesaid, within the space of two years from the day on which such bill shall have been presented for His Majesty's assent, to the governor, lieutenant-governor, or person administering the government of such province. " Act Imp. 31e Geo. III, chap. XXXI, sec. 32. Le Parlement impérial pouvait bien dire qu'à l'avenir, malgré la clause de l'acte constitutionnel, Sa Majesté pourrait, par sa sanction, même après les deux ans, prolonger la vie, à ce qui, sans cela, cesserait de l'avoir, c'est sans doute, ce qu'il a fait, mais, jamais le parlement impérial, par un acte, qui ne réfère pas d'une manière directe à l'acte provincial en question (celui de 1829), y eût-il même référé, n'a pu faire que ce qui était mort, fût vivant, que ce qui était nul, fût accompli, devînt valide et eût une existence. C'est d'abord, une contradiction *in terminis*, c'est de plus, vouloir que le Parlement impérial statue que le Roi fasse une impossibilité.

Il s'ensuit que si le statut impérial veut dire cela, il a dit ce qui n'est pas possible, et que s'il n'a dit ni voulu dire telle chose, le Roi, en donnant sa sanction à un acte qui n'était plus un acte, mais une nullité parfaite, a tenté une impossibilité ; il a fait, de son autorité privée, ce qu'il n'avait aucun droit de faire.

Il résulte de tout cela, que l'acte provincial de 1829 ne pouvant affecter l'acte impérial des tenures, il faudrait, avec les modifications mentionnées plus haut, le limiter, dans tous les cas, aux trois objets dont il a été parlé ci-devant. Bien entendu, dans la supposition que le parlement impérial eût eu le droit d'intervenir comme il l'a fait, par l'acte 6 Geo. IV, ch. LIX, sec. 8, ce que je nie plus fortement que jamais.

Si, par hasard, en l'absence de toute bonne raison, on m'opposait que la Législature du Bas-Canada a reconnu ce droit d'intervention, je me contenterais de répondre que cela prouverait, tout au plus, qu'elle a eu tort, et que deux erreurs ne font jamais une vérité.

Et pour faire toucher du doigt le peu de logique qu'il y aurait à tirer des conséquences de prémisses aussi lumineuses, il me suffirait, sans doute, de référer les avocats et le barreau en général, à l'ordonnance du Conseil spécial, 2 Vict., ch. LI,

qui révoque une certaine ordonnance, intitulée : " Ordonnance pour déclarer que le second chapitre du Statut du Parlement d'Angleterre, passé dans la trente et unième année du règne du roi Charles Second, n'est pas, ni n'a, jamais été en vigueur en cette province, et pour d'autres fins."

C'est ainsi que la Législature d'alors déclara sérieusement, par une ordonnance 2 Vict., ch. XV, que l'acte de l'*habeas corpus* (31 Charles. II, ch. II) n'avait jamais été en vigueur en Canada, et, par une autre ordonnance (2 Vict., ch. LI), le Conseil spécial, par sa toute-puissance " Attendu qu'il convient, d'après les circonstances, de révoquer une certaine ordonnance, &c.", révoque la première, et permet au pays de repasser sous l'empire de l'acte impérial 31 Charles. II, ch. II.

Je pourrais, si le temps me le permettait, citer d'autres actes de législation aussi logiques que celui-là, pour faire voir qu'il vaut mieux s'en tenir à des principes fixes, avoués par la raison et la loi.

Au reste, je ne suis pas plus disposé de me prosterner en présence des actes du parlement provincial, qui reconnaîtraient au Parlement impérial des droits qu'il ne possède pas, que de m'incliner en silence devant les décrets de la Législature impériale, en une matière qui n'est pas de son ressort, et sur laquelle, elle n'avait pas assurément plus de droit, en 1826, de de violer ses garanties et les droits acquis, que de fouler aux pieds en 1774 le *jus gentium*, chose qu'elle n'a jamais, alors, eu l'idée même de tenter.

Les raisons puissantes, qui avaient tant de force dans la bouche des hommes d'État à l'époque entre la proclamation de 1763 et l'Acte impérial de 1774, et sur lesquelles l'Acte de Québec a été calqué, ont bien plus de force aujourd'hui qu'elles n'en avaient alors, puisqu'à une période si rapprochée de la victoire, l'Angleterre reconnaissait des principes d'une éternelle justice, qu'une possession de 52 ans (1774 à 1826), n'a certainement pas pû avoir l'effet d'affaiblir.

Ainsi donc, sous quelque point de vue qu'on se représente la question, qu'on se reporte en 1774, ou en 1826, ou même en 1829, toujours elle nous offre la même solution ; les lois civiles anglaises n'ont jamais fait partie des lois de ce pays, pas même pour les terres tenues *en franc et commun soccage*, sauf, que de la nature même des choses, et inévitablement, les lois qui règlent la tenure seigneuriale sont sans application à la tenure *en franc et commun soccage ;* et que, s'il résultait de l'Acte des Tenures aucune modification à nos lois de propriété, même dans les *townships*, ce que je nie absolument, ces modifications n'auraient j'amais pu affecter les droits acquis, et ne pourraient être regardées que comme règles de droit à appliquer prospectivement seulement, mais jamais rétroactivement.

Au reste, dans la supposition même où l'acte 10 et 11 G. IV, ch. LXXVII (1829), pût produire quelque effet, il suffit de le lire pour se convaincre que son contenu entier a pour objet principal de consolider les lois du pays, même à l'égard des terres tenues *en franc et commun soccage*, soit par rapport à la forme des titres, tant avant que depuis cet acte (1829), les hypothèques créées dès avant ou depuis, et quant à la répartition de ceux qui, en ayant *en franc et commun soccage*, seraient décédés sans avoir fait de testament.

Il faut voir maintenant si, d'après les lois du pays, les lois françaises, quant aux droits de propriété, le demandeur a prouvé une possession de 30 ans.

Les Demandeurs font remonter leur droit à la patente du 27 novembre 1799, accordée par Sa Majesté à John Robertson.

Il est à peine nécessaire de dire, en passant, que depuis la passation de l'Acte de Québec, il peut y avoir un doute légitime quant à l'effet d'une patente, par rapport à ce que l'on entend par *delivery of seizin* ; cependant, je n'insisterai pas sur ce point, car il me paraît plus à propos de reconnaître, que quant au *patentee, le delivery of seizin* s'opère de suite, mais je nie que cette fiction puisse, en ce pays, s'étendre audelà.

Le 15 octobre 1804, John Robertson vend à Patrick. Celui-ci ne paraît pas avoir jamais fait acte de possession. Il meurt. Neil lui succède. Il meurt le 18 juin 1813. Les Demandeurs prouvent que Sutherland a possédé (de 20 à 30 ans,) comme curateur à la succession vacante de Neil qui a renoncé. Il n'y a pas, à la vérité, de renonciation à la succession, de produite, bien que, par la requête, le fait apparaît. Mais, dans tous les cas, les Demandeurs produisant la curatelle, pour établir une continuité de possession, ils ne peuvent la dénaturer. C'est leur propre titre, cette curatelle qu'ils produisent prouve que les auteurs de l'épouse du demandeur n'étaient plus possesseurs, puisque la succession était vacante. Si les actes de possession du curateur valent quelque chose, ils ne valent plus pour les auteurs des Demandeurs, bien qu'ils pussent devenir utiles aux créanciers ou à d'autres, peut-être. Le chaînon est arraché à la chaîne, et les Demandeurs ne sont pas devant la cour, avec la preuve suivie, non interrompue, d'une possession de 30 ans. Ils n'ont donc pas acquis la prescription par une possession de 30 ans.

Les Demandeurs fondent-ils leur action sur un titre translatif de propriété ?

Le premier titre, c'est la patente de 1799, qui, d'après ce qui a été observé plus haut, n'a pu produire le *delivery of seizin*, tout au plus qu'au *patentee*, John Robertson. Le second titre est celui du 15 octobre 1804, par lequelle Mme Robertson et Wm. Martin, se disant procureurs de John Robertson, époux de Mme Robertson, vendent à Patrick Robertson et aux

héritiers Alexandre Robertson, représentés par M. Desrivières, leur tuteur.

Ce titre a-t-il été exécuté par la tradition ? Cela ne paraît aucunement.

Ce n'est pas ici le lieu d'entrer dans une discussion philosophique sur le mérite du nouveau droit comparé à l'ancien, relativement à la question de savoir si la tradition est nécessaire pour imprimer à l'acte de vente ce caractère de perfection qu'il lui faut. Il y a, à n'en pas douter, une différence marquée entre les doctrines qui prévalaient en France, sous l'empire de l'ancien droit, et celles qui ont été recues et adoptées sous l'influence du nouveau droit. Je renvois à Toullier et aux autres auteurs qui ont si savamment approfondi cette question, ceux qui font, comme on le doit, une étude philosophique du droit ; comme juge, je me conforme pour le présent à la jurisprudence française, telle que nous l'avons eue, et telle que nous devons y avoir égard. Elle existait, et c'était la loi, il n'y a pas moyen d'en douter ; à nous de nous y conformer jusqu'à ce que l'on y ait apporté des modifications.

Cela posé, il s'ensuit que le titre de 1804, étant demeuré sans exécution, il ne résulte plus tard, aucun droit, à qui que ce soit, qui réclame en vertu de ce titre. Les Demandeurs se trouvent, par conséquent, sans titre translatif de propriété, et il va sans dire qu'il ne peut plus être question des diverses prescriptions plus courtes que celles de 30 ans, que les Demandeurs invoquent avec titre.

Supposant maintenant, que les Demandeurs aient eu un titre, le Défendeur en a-t-il un ? et s'il en a un, de qui le tient-il ? et enfin, l'enregistrement qu'il en a fait avant les Demandeurs, lui confirme-t-il ce titre, au préjudice de celui des Demandeurs.

Il ne faut pas oublier que si les Demandeurs ont un titre, ce titre est sans exécution, et que le Défendeur, lui, en a reçu un, le 2 août 1833, de Madame Robertson, veuve du dit John Robertson, qui, elles et ses filles, patentes en main, avec la qualité, comme le droit, d'héritières de John Robertson, ont vendu au Défendeur qui était publiquement en possession, avait travaillé, défriché, et qui, en achetant, a payé £400, et a depuis continué de travailler ; et qu'en confirmation de ces actes pratiques, il a, le 15 août 1833, enregistré son titre auquel il a donné la publicité voulue *strictement* par une loi (10 et 11 Geo. IV, ch. VIII) faite dans ce but, et dont les dispositions ont été, par une autre loi (1 Guil. IV, ch. III), étendues à *l'Ottawa*.

Quant à prétendre que le Défendeur connaissait que les Demandeurs étaient propriétaires, c'est vouloir que le Défendeur en sût plus long que qui que ce soit ; qu'il découvrît des droits de propriété et des actes de possession là où nul autre

en a connu ; c'est vouloir que qui n'a jamais eu de possession, ait possédé le tout ; c'est vouloir que des *on dit* et des rumeurs tiennent lieu de faits. Ce serait vouloir faire que la cour présumât la *mauvaise foi* là où il n'y en a aucune de prouvée ; ce serait, en un mot, vouloir que le Défendeur sût ce qui n'est pas et n'a jamais été, c'est-à-dire, que les Demandeurs étaient et sont propriétaires des lots de terre dont il s'agit.

Je me résume : Il est prouvé que les Demandeurs sont sans titre ; qu'ils ne peuvent invoquer la possession voulue pour leur faire acquérir la prescription de 30 ans, nécessaire à leur action de revendication ou pétitoire, qui serait pour eux un titre suffisant ; qu'ils n'ont fait preuve d'aucune autre espèce de possession qui, avec titre et les qualités voulues par la loi, leur conférât un droit ; que le Défendeur ayant un titre, et l'ayant fait enregistrer, a reçu, non seulement la confirmation d'un droit à la propriété dont il est question, qu'il possédait dès avant l'enregistrement, mais a aussi, et, en outre, obtenu, par cet enregistrement qu'ont négligé d'effectuer les Demandeurs, une déchéance de tout droit qu'avaient ou pouvaient avoir les Demandeurs à cette propriété.

Et comme rien n'eût été défini et tranché quant à l'assertion comme à la preuve des propositions que j'ai énoncées, et des principes sur lesquels je me suis fondé, sans établir que cette cause doit être jugée d'après les lois françaises, les lois du pays, et non suivant certaines règles du droit civil de l'Angleterre ; je regarde comme démontré, de manière à n'en pas permettre le doute, que jamais les lois civiles de l'Angleterre n'ont été, quant aux propriétés, introduites en Canada, je parle du Bas-Canada ; et que les terres tenues en *franc et commun soccage*, et nommément celles dont il est question en cette cause, doivent être, sauf ce qui tient essentiellement à la tenure, réglées d'après les lois du pays ; n'y ayant aucune autre exception aux règles du droit du pays, que celle qu'y apporte l'article XI de l'Acte de 1774, quant aux lois criminelles,et celles de la sec. 10 te l'ordonnance provinciale de 1785, quant aux règles de témoignage dans les affaires commerciales.

D'après toutes ces raisons, j'opine pour le débouté de l'action du Demandeur.

Je dois à mon confrère M. le juge Vanfelson, de déclarer distinctement, qu'en dressant les motifs du jugement de la cour, j'ai eu soin, dans le second considérant, de ne rien dire de l'Acte de Tenures, non plus que dans les autres considérants, attendu qu'il admet le droit du Parlement impérial de législater en cette matière, et que moi je nie à la Législature impériale le droit d'intervenir de la sorte, sous le prétexte d'un doute qui n'existait pas même ; la proclamation de 1763, et l'Acte de Québec n'ont pas introduit en Canada les lois civiles

anglaises, point sur lequel M. le juge Vanfelson et moi sommes d'accord, comme en fait foi le premier considérant du jugement.

"Considering that the civil laws of England have not, either by the proclamation of Geo. III, bearing date the 17th October, 1763, or by the act of the Imperial Parliament of 1774, chap. LXXXIII, commonly called the Quebec Act, ever been introduced into that part of the territories, in North America, ceded by the French King to His Majesty Geo. III, on the 10th February, 1763, which subsequently was known as, and was the Province of Lower Canada, and now is a part of the Province of Canada, considering that, subsequently to the said proclamation of 1763, and the aforesaid Imperial Act of 1774, chap. LXXXIII, there has never been introduced into the aforesaid Province of Lower Canada, now a part of the Province of Canada, any law of Great Britain, or of any part thereof, whereby and in virtue whereof, Plaintiffs in this cause can claim in their favor any adjudication on any of the matters by them set forth in their declaration; considering that Plaintiffs have altogether failed to establish, according to law, that, by a possession of thirty years, or by any possession whatever, such as required by law, they have acquired a right of prescription to the lots of land and immoveable property, the subject matter of this action, against Defendant; considering that Plaintiffs have not legally established that they ever have or now have a right, either by title (*titre*) or by and in consequence of possession, together with title, such as by law can or may be recognized, to the property, or any part thereof, which is the subject matter of this action; considering that Plaintiffs have themselves, by the production of the act of curatorship, bearing date 7th April, 1808, appointing Daniel Sutherland curator to the vacant estate of Patrick Robertson, established that the acts of possession of D. Sutherland in respect of the said property, were for and in the interest of the vacant estate, aforesaid, or of the creditors of the said vacant estate, and that, therefore, there hath been an interruption in the possession which Plaintiffs claim and rely upon, and that, in consequence they have had no such possession as that which could give them a title by prescription; considering that the deed of sale of the 15th October, 1804, made by Catherine Christie and William Martin, styling themselves joint attorneys of John Robertson, to Patrick Robertson, and to the minors of Alex. Robertson, whereby Plaintiffs claim a right to the property, the subject matter of their said action, hath never been executed or followed by *tradition*, and Plaintiffs have not shewn or established in any way that said deed of sale hath ever conferred upon and to those they pretend to represent, or upon or to themselves, any

right to said property; considering that Defendant, by and in virtue of a deed of sale of the 2d August, 1833, to him said Defendant, by Catherine Christie, widow of said above mentioned John Robertson, in her own name, and her three daughters Catherine, Margaret Mary, and Amelia, the first of whom was married to Philip Anglin, being the heirs at law of their father, said John Robertson, said Defendant being then in possession of the said property so sold to him for a valuable consideration, as aforesaid, hath become and since hath been and now is the proprietor thereof; considering that, in conformity to the Provincial Statute 10th & 11th Geo. IV, chap. VIII, and in pursuance of the said statute, the provisions whereof have subsequently, to wit, by the statute of the Province of Lower Canada of 1 Will. IV, chap. III, been extended to all such lands and other immoveable property, as at the time of the passing of the said last mentioned act, were, or thereafter should be held in free and common soccage in the counties of Ottawa, Beauharnois and Megantic, the said property, so sold to Defendant being and lying in the said county of Ottawa, Defendant, on the 15th August, 1833, caused said deed of the 2d August, 1833, under which he had acquired said property to be registered at the registry office for the county of Ottawa aforesaid, established under and by virtue of said statutes: considering that in consequence of the said enregistration of the title of him Defendant, Plaintiffs not having then or before the said 15th August, 1833, enregistered or caused to be enregistered said deed of the 15th October, 1804, or any older title or deed, whereby they claimed or could claim any right to the said property, the subject matter of the present action, he Defendant, hath, to all legal effects, been confirmed in his right by him duly acquired to and in said property, the subject matter of the present action; considering that, independently of the confirmation of Defendant's title, as aforesaid, by and in virtue of the aforesaid registration, said title of the 15th October, 1804, invoked and rested upon by Plaintiffs, hath become inoperative and of no effect, and utterly void against Defendant in this cause, as a conveyance, and cannot and doth not in law in anywise avail Plaintiffs; considering lastly, that Plaintiffs have in nowise proved their allegations, so as to be entitled to an adjudication in their favor, and that this action should be dismissed.

Doth dismiss the same. (2. *D. T. B. C.*, p. 369.)

STUART, H., Attorney for Plaintiffs.

ROSE, of Counsel for Plaintiffs.

DRUMMOND and LORANGER, Attorneys for Defendant.

C. S. CHERRIER, Q. C. and

GRIFFIN, of Counsel for Defendant.

LOIS DU BAS-CANADA.—PROCLAMATION DE 1763.—ORDONNANCE DE 1764.—ACTE IMPERIAL DE 1774.—ACTE IMPERIAL DE 1791 ACTE IMPERIAL DE 1826.—ACTE PROVINCIAL DE 1829.

COURT OF QUEEN'S BENCH, APPEAL SIDE, Montreal, 12 juil. 1853.

Before ROLLAND, PANET, AYLWIN & MONDELET, D., Justices.

SIR JAMES STUART et uxor, Appellants, and BAXTER BOWMAN, Respondent.

Questions relatives à l'introduction des lois anglaises en Canada, depuis la conquête, et notamment aux dispositions contenues : 1° dans la Proclamation royale de 1763, qui confère au Gouverneur du Canada le pouvoir d'établir des Cours de Justice, devant juger suivant la loi et l'équité, en se conformant autant que possible aux lois d'Angleterre, &c., 2° dans une Ordonnance du Gouverneur de 1764, établissant des Cours de Justice, avec instruction de juger suivant l'équité, en se conformant autant que possible aux lois d'Angleterre; 3° dans l'Acte Impérial de 1774, 14 Geo. III, ch. LXXXIII, sec. 4, qui rappelle et abroge la Proclamation de 1763 et les Ordonnances faites sous son autorité, sanctionne l'usage des lois anglaises depuis la Proclamation de 1763, et rétablit l'existence des lois françaises, sauf quant aux terres tenues en franc et commun soccage; 4° dans l'Acte impérial de 1791, 31 Geo. III, ch. XXXI, sec. 43, qui permet la concession de terres en franc et commun soccage, sujette aux modifications de la Législature coloniale; 5° dans l'Acte impérial de 1826, 6 Geo IV, ch. LIX, sec. 8, qui déclare que les terres concédées en franc et commun soccage sont soumises au régime des lois anglaises; et 6° enfin, dans l'Acte provincial de 1829, 9e et 10e Geo. IV, ch. LXXVII qui valide les droits des propriétaires des terres tenues en franc et commun soccage, quoiqu'ils n'aient pas été strictement acquis ou exercés, conformément aux lois anglaises, et qui modifie les lois anglaises relativement à la tenure en franc et commun soccage. Question quant à la légalité de ce dernier Acte, réservé à la sanction royale, et sanctionné après le délai fixé par la 31e Geo. III, ch. XXXI, sec. 32, mais sous l'empire de l'Acte Impérial 1ère Wm. IV, ch. XX.

Jugé : 1. Que dans l'espèce particulière, le titre de propriété des Appelants, invoqué par eux, est valide, soit qu'il soit jugé suivant les lois anglaises ou les lois françaises.

2. Que les règles du droit français sont applicables au cas présent.

3. Que la tradition réelle n'est pas absolument nécessaire, suivant l'ancien droit français, pour faire passer la propriété du vendeur à l'acquéreur et que la tradition feinte ou symbolique, comme la remise de titres, de lettres patentes, plans, &c., &c., peut suffir, et, qu'en conséquence, la vente faite par John Robertson à Patrick Robertson et autres, en 1804, de l'étendue de terrain à lui concédé en 1799, par lettres patentes, a eu son effet par la tradition symbolique résultant de la remise des titres et des plans d'icelui.

4. Que le dit John Robertson et ses représentants, et notamment les Appelants en cette cause, ont eu de fait la possession de l'étendue de terrain en contestation en cette cause.

5. Que la vente faite en 1833, par la veuve et les enfants du dit John Robertson à Baxter Bowman, près de trente ans après celle faite par John Robertson lui-même, est nulle, par défaut de propriété dans les vendeurs, et pour cause de fraude et de collusion entre les parties contractantes.

6. Que le défaut d'enregistrement de l'acte de vente par Robertson, en 1804, et l'enregistrement de l'acte de vente par sa veuve et ses enfants, en 1833 (*acte réputé nul*) suivant les dispositions de la 10e et 11e

Geo. IV, ch. VIII, n'ont pu préjudicier aux droits de propriété des légitimes propriétaires (les Appelants en faveur d'un acquéreur de mauvaise foi (l'Intimé) ; en d'autres termes, que l'enregistrement ne valide pas un titre nul, à l'encontre des droits du légitime propriétaire, lors même que celui-ci n'a pas enregistré son titre.

Cet appel est du jugement rendu dans la cause précédente.

ROLLAND, juge : Cette cause a présenté sur l'appel plusieurs questions importantes. Il est à regretter que, sur la principale de ces questions, savoir, quelles lois doivent affecter les droits des parties, il y ait eu, en ce pays, autant d'opinions différentes ; les uns disent que, par l'effet de la conquête (ou si l'on veut, de la cession du pays à la Grande-Bretagne), le droit de la métropole a été introduit ; d'autres veulent qu'il l'ait été par la proclamation de 1763, quelques-uns soutiennent qu'il l'a été virtuellement, sinon formellement, quant aux terres tenues de la couronne en franc et commun soccage, par le Statut impérial de 1774 (14 Geo. III) ; d'autres, enfin, qu'il n'a eu force de loi pour régler l'aliénation de ces terres, et les successions et le douaire des femmes, que par le Statut impérial de 1826 (6 Geo. IV) ; et, sur ce Statut, il y a eu deux opinions, les uns le considérant comme acte déclaratoire, ou ayant effet rétroactif, et d'autres comme une loi qui ne pourvoit que pour l'avenir. Enfin, il en est qui ont eu recours à l'acte provincial de 1829, pour y trouver le droit qui doit régir cette espèce de propriété, le regardant comme acte déclaratoire sous bien des rapports ; tandis que bien des personnes (avocats comme juges) ont cru qu'il n'y avait pas une telle loi, la sanction royale n'ayant été donnée qu'après que l'acte de législation des chambres (le projet ou *bill* des chambres) eût cessé d'avoir effet, en autant que le temps limité pour l'octroi de la sanction royale, et pendant lequel les *chambres étaient liées*, était expiré ; ils prétendent, avec beaucoup de plausibilité, qu'on ne peut sanctionner un acte des chambres qui est tombé dans le néant, et cela, nonobstant qu'un Statut impérial ait semblé avoir pour but de légaliser telle sanction tardive, et, tout en respectant cette législation du pouvoir souverain, qu'on regarde néanmoins comme ne voulant pas ce qui serait absurde. Quant à cette loi de 1829 (je l'appelle loi parce qu'elle a été regardée comme telle, qu'elle se trouve dans notre *Code provincial*, c'est-à-dire imprimée avec nos statuts, et cela par autorité, avec la proclamation qui avait pour but de lui donner la sanction royale), j'avoue que je suis bien aise que cette question délicate, dans l'état actuel des choses, ne se trouve pas soulevée ou susceptible d'une application immédiate au sujet en discussion ; car, nous sommes unanimes à juger la cause sans nous prononcer " par un *obiter dictum* " sur cette question qui ne se présente pas ; aussi, je me dispenserai d'exprimer mon opinion

individuelle. Pour procéder méthodiquement, je partirai d'un principe bien connu " que, dans la revendication, c'est au De-" mandeur à établir son titre, sans qu'on doive s'occuper du " titre de possession du Défendeur, qui n'a besoin d'aucun " titre si le Demandeur n'établit sa propriété, sauf à faire " droit sur les defenses, si le Demandeur a établi un titre, mais " sujet à être combattu."

Je prends donc la déclaration qui ne contient pas moins de douze chefs, ou causes, ou allégués de titres à la demande. L'on nous a dit que six de ces titres invoqués, l'étaient d'après le droit anglais et autant d'après le droit français. C'était une distinction bonne en plaidant, mais pour nous, juges, elle est à peu près fausse ou du moins inutile. Le Demandeur doit dire que tous ses titres, ou le meilleur (s'il n'en a qu'un de bon) sont d'après la loi du pays, le seul droit que nous connaissions. Quand on parle du droit anglais, l'on veut sans doute dire ce qui se trouve faire partie de notre droit, et cela se comprend. Cette distinction a, de suite, donné lieu à la question si importante et si débattue, savoir, si le titre aux terres en ce pays tenues en franc et commun soccage se juge d'après le droit anglais ou non ; et si le droit anglais relatif aux terres tenues à ce titre est en force ici, s'il y a été introduit, quand et comment ?

De suite, j'exprime mon opinion qu'il n'a pas été introduit par la cession du pays à la Grande-Bretagne ; qu'il fallait une manifestation authentique et formelle du nouveau souverain, un acte de législation à cet effet, et qu'il n'y a rien eu de tel jusqu'à la passation du Statut de la 14e Geo. III. Je ne m'expliquerai pas plus au long. Puis, lisant ce Statut impérial, je n'y trouve rien de déclaratoire qui puisse avoir un effet rétroactif, tout au contraire. Mais, cet acte reconnaissant qu'il y a telle chose au pays qu'une tenure *in free and common soccage*, a-t-il par là législaté ou reconnu un droit particulier pour cette espèce de tenure ; ou, en disant que le droit du pays ne s'y appliquerait pas, a-t-il voulu seulement empêcher l'effet d'un principe fondamental quant à la tenure des terres en Canada, je veux dire l'effet de la maxime, " nulle terre sans seigneur ?" Ceci devient une question assez délicate. D'abord, le Statut de 1774 déclare que, depuis la cession du pays, *il n'a été fait aucun règlement pour l'administration du gouvernement civil.* C'est le préambule. Puis, vient la 8e clause qui dit, que tous les sujets canadiens de Sa Majesté " shall hold and enjoy " their property and possession, together with all customs and " usages relative thereto, and all other their civil rights, in as " large, ample and beneficial manner as if the said Proclamation " (of 1763), commission, ordinances, &c., had not been made ; " and that in all matters of controversey relative to property

" and civil rights, resort shall be had to the laws of Canada, " &c., and all actions determined agreeably to the said laws " and customs." Peut-il y avoir rien de plus exprès que ce langage de la loi ? Mais, suit la 9e clause qui fait la difficulté, et à ceux qui prétendent que le droit anglais a été introduit ou conservé pour les terres tenues en franc et commun soccage, l'on peut dire qu'on n'introduit pas un système de lois étrangères par un mot, et, comme l'a dit, à l'égard de l'office du shérif, Sir W. Grant, dans une cause célèbre, " par cela que dans une " loi l'on a parlé d'un shérif, (mot anglais, office connu en Angle- " terre), il ne s'en suit pas que cet office et les obligations de " l'officier soient les mêmes en Canada qu'en Angleterre. " De même, peut-on dire, ce semble avec beaucoup de raison : " parce " qu'une tenure est établie en Canada semblable à une qui pré- " vaut en Angleterre, il ne doit pas s'ensuivre que dans la suc- " cession et le régime de ces terres, dans tous les contrats et tran- " sactions, et dans l'administration de la justice, relativement " à ces terres, il faudra avoir recours à un droit autre que celui " du pays, avec tous les désavantages qui peuvent en résulter." Quoique les lettres patentes ou concessions royales de ces terres fassent mention de ce nouveau système, le statut n'en dit rien, la 9e clause est muette à cet égard, et conçue dans des termes négatifs. Le statut devant être interprété dans le sens le plus naturel, on ne doit donner à la clause 9e qu'un effet limité, quoique les termes soient généraux, et cela, quant à la tenure qui ne doit pas être affectée par cette loi déclaratoire, mais demeurer tenure libre, ce qui n'a rien de contraire au droit du pays, sans qu'on puisse imaginer que l'intention était de reconnaître l'existence du droit anglais dans toute son application aux biens-fonds sous la tenure en franc et commun soccage, ce qui, comme on l'a reconnu plus tard, eût créé la plus grande confusion. Aussi, n'a-t-on agi que dans ce sens-là ; des partages de succession et des aliénations nombreuses ont eu lieu d'après le droit du pays, je n'ose *l'appeler meilleur*, mais je dirai qu'il est assurément *plus avantageux* ; et, en effet, la loi de 1829, ce projet de loi sanctionné après qu'il avait cessé d'exister, fait assez voir que l'introduction d'un nouveau droit, au moins pour le passé, eût été préjudiciable. Je suis du nombre des juges qui ne considèrent pas le statut de 1774 comme introduisant aucune partie du droit anglais, et je suis d'avis que la reconnaissance d'une tenure libre, non sujette à la maxime " nulle terre sans seigneur, " mais régie par le droit du pays, est tout ce que la loi voulait, et que tout autre interprétation était inadmissible ; car, il faudrait dire que tout le droit anglais avait été introduit avant 1774 (chose absolument contredite par le statut même) et que la 9e clause avait l'effet de le conserver pour la règie des terres en question *dans toutes*

ses parties, prétention que personne n'a émise, et que le Statut de la 6e Geo. IV, qu'on a appelé loi déclaratoire, contredit formellement, puisqu'il ne parle du droit anglais que comme réglant les aliénations, les successions et le douaire, excluant ainsi l'idée d'un droit universel. Or, le Statut de 1774 ne dit rien de cela; cette 9e clause n'est donc succeptible d'autre interprétation que de celle que je lui ai donnée, et qui n'exclut pas la régie des terres de franc et commun soccage par le droit commun du pays, c'est-à-dire, le droit tel qu'il existait lors de la cession du pays, "*The law of Canada,*" expression forte du Statut impérial. Si l'on prétend que ces lois, ces coutumes et ces usages du Canada, dont parle le statut, ne doivent s'appliquer aucunement aux terres tenues et concédées en franc et commun soccage, ils ne pourront pas davantage servir de règle de décision dans les litiges judiciaires à l'égard de ces biens, soit à raion de leur tenure, soit à raison de quelque privilège qui s'y rattache, et ces litiges seront soustraits à l'action des lois du pays, et, par rapport à icelles, la 8e clause de l'acte de 1774, serait une lettre morte. Ce serait une prétention *bien hardie* et une interprétation de la 9e clause *bien illimitée* que celle-là. Et pourtant, si l'on prenait à la lettre ces mots "*nothing* "*in this Act contained, &c.,*" voilà où il faudrait en venir. Si la 9e clause a eu l'effet de reconnaître un droit particulier de succession (avec la primogéniture et le reste) elle irait beaucoup plus loin: car elle invaliderait l'acte en entier à l'égard des terres en question en cette cause. En la limitant à la 8e clause, ce qui serait plus plausible, elle irait encore plus loin comme je l'ai déjà observé, et cela sans qu'il y ait un mot dans le Statut qui reconnaisse le droit anglais comme en force au pays, ni en tout ni en partie, ni dans les townships, ni ailleurs car le Statut est tout à fait dans l'autre sens.

L'on n'introduit pas un système de lois exceptionnel par des termes négatifs, en disant que les lois du pays ne s'appliqueront pas aux matières en question, sans dire par quelles lois elles seront régies et en quoi? Car dire que rien absolument du droit du pays n'y aurait d'application est une proposition trop étrange, ce me semble, pour qu'elle puisse être adoptée. Je tiens donc qu'en interprétant cette 9e clause, il faut le faire *magis ut valeat, &c.*, et qu'en en restreignant le sens à la tenure de manière à l'exclure de la loi des fiefs, loi fondamentale de tenure au pays, on remplit le but qu'avait la législature.

Mais, dit-on, il y a des lettres patentes qu'on doit considérer, et elles sont formelles *et réfèrent* au droit anglais. D'abord, j'observe qu'il n'est pas d'usage d'interpréter une loi par des titres, mais bien les titres par la loi; et que, quoique le donateur puisse établir des règles pour la régie du bien donné, ce ne peut être qu'en autant qu'il y a intérêt, et c'est là tout.

Mais viendra la question de savoir si le souverain en donnant un bien sous une tenure comme dans sa métropole, a voulu, s'il le pouvait, que les lois du pays n'eussent aucun effet à l'égard de ces terres, et qu'elles fussent régies par un droit exceptionnel ? Cela ne me paraît pas exprimé, et il en faudrait une stipulation expresse, et pour que la volonté du souverain fût connue quant à la régie du bien donné, il faudrait qu'il l'eût exprimée. Il n'en a rien dit.

Mais l'acte de la 6e Geo. IV, (Canada Trade Act) s'exprime-t-il d'une manière précise ? Oui, mais seulement quant à trois objets, et pour l'avenir; c'est ainsi que *je le lis.* D'abord, il ne pouvait être déclaratoire qu'en reconnaissant l'existence d'un droit pris de l'Angleterre, et contraire au nôtre en tout ce qui affecte ces terres. Ce n'est point du tout cela. Il ne reconnaît que le droit des successions, des douaires et des aliénations, quant au reste, il ne dit rien. Qu'était-il besoin de spécifier ces trois choses, si, dès avant, le droit anglais avait été introduit et subsistait ; ce qui n'est aucunement reconnu par cela même qu'on en limite l'effet par rapport aux terres en question. C'est nécessairement une législation *prospective* sans effet rétroactif, et cela pour régler la tenure, sauf les changements qu'on avait en contemplation. Cet acte est encore en force si le Statut provincial de 1829 ne l'est pas. Cependant les droits des parties en cette cause n'en peuvent être affectés, et les biens ont dû passer, *ab hærede,* dans la famille Robertson, comme si le Statut impérial n'eût pas été passé, c'est-à-dire, d'après le droit du Canada tel qu'il était. Qui empêche qu'une terre libre par sa tenure se transmette par succession, comme les autres biens au pays ?

J'entends dire qu'en Angleterre la tenure a des règles toutes spéciales, qu'elle comporte des obligations, et qu'elle a même des privilèges : mais, pourquoi en Canada ne serait-elle pas régie par le droit commun ? Il faudrait au moins en donner la raison. En Canada, nous avons le testament suivant les formes anglaises, s'en suit-il que nous avons la loi des legs, *lex testamentaria ?* Je sais qu'on l'a prétendu, mais cette prétention, comme tant d'autres, *toujours pour introduire partiellement, et à chaque occasion, le droit anglais,* n'a pas prévalu. Il en a été de même des règles de la preuve, dans les affaires de commerce, dont on a voulu déduire bien plus que l'Ordonnance de 1785 ne comporte.

Comme j'ai compris que c'est sur le Statut impérial de la 6e Geo. IV, que les Demandeurs fondent leur prétention dans le premier chef de leur demande, où l'on dit qu'ils invoquent le droit anglais, *j'y passe de suite ;* mais, auparavant, il faut dire un mot du Statut de 1790, l'Acte constitutionnel, mais, dans le fait, cet acte n'ajoute rien à celui de 1774. La clause 43e dit

que les terres qui seront concédées par la Couronne, en franc et commun soccage, dans le Bas-Canada, le seront ainsi sujettes à telles altérations, eu égard à la nature et aux conséquences de telle tenure, qui pourront être établies par un Statut provincial. C'est subséquemment à cette époque qu'ont été concédées les terres revendiquées en cette cause (en 1799). C'est une manière générale et bien peu satisfaisante de parler des conséquences de cette tenure étrangère au pays, et je le répète encore, ce n'est pas ainsi, ce me semble, que l'on introduit un droit exceptionnel. Aussi n'y a-t-on guère fait attention, et les terres ont continué à se vendre par acte devant notaires, les partages en succession ont eu lieu d'après le droit commun du pays, et les douaires ont été réglés de même. Les tutelles, les administrations de biens et autres choses ayant rapport à ces terres ont continué de se faire comme par le passé. C'est ce qui est reconnu par les Statuts même.

La clause du Statut de la 6e Geo. IV : " That all lands granted " in free and common soccage may and shall be held, granted, " exchanged, sold, alienated, transferred, &c., " est donc, suivant moi, entièrement prospective, et je n'y vois rien de rétroactif, car l'on y eût certainement pourvu aux droits acquis.

L'on nous a référé au Statut de la 3e Geo. IV, mais je n'y vois qu'une idée, celle de changer la tenure des terres du pays en celle de *free and common soccage*, comme en Angleterre.

L'on a aussi prétendu que l'acte provincial de 1829 reconnaît, comme loi déclaratoire, le Statut impérial de la 6e Geo. IV ; j'y vois tout le contraire, car ce Statut provincial parle des effets *injurieux* qui résulteraient d'un effet rétroactif, s'il était donné au Statut impérial, et, surtout, quant à l'article des successions, il ordonne expressément " que la loi du Canada " (c'est-à-dire les anciennes lois du pays) sera la règle des suc- " cessions, quant aux terres ci-devant concédées *in free and* " *common soccage*, excepté dans le cas d'un partage volon- " taire. "

Si l'on considère le statut de 1829 comme en force, la succession, quant aux terres en question, se trouve devoir être réglée par l'ancien droit du pays, car il n'y a eu ni partage ni transaction, au sujet de la succession de Patrick Robertson, non plus que de ses successeurs.

Je n'ai donc aucune difficulté à donner comme mon opinion que les terres en Canada, tenues de la Couronne en franc et commun soccage, passaient par succession, suivant le droit du pays, lors de l'acte impérial de la 6e Geo. IV. Ni les Statuts impériaux de 1774 et de 1790, passés avant l'émanation de la concession royale à John Robertson (1799), ni le Statut impérial de la 6e Geo. IV, auquel je n'accorde aucun effet rétroactif, ni les lettres patentes qui en fixent la tenure, n'ont, sui-

vant moi, rien changé au droit commun du pays, quant à la succession, d'autant plus qu'il n'en est rien dit dans les lettres patentes, et qu'on n'y trouve rien qui manifeste même l'intention du donataire à cet égard. Il n'y est question que de la tenure seule, tenure libre, n'emportant pas avec soi, suivant moi, l'introduction du droit commun des successions d'Angleterre, (le droit anglais qu'on étend au mode d'aliénation sans aucun prétexte quelconque) excepté en autant qu'il peut avoir été introduit par le Statut de la 6e Geo. IV, et qui n'est pas, dans mon opinion, applicable au cas actuel, pour des aliénations et successions antérieures.

L'on comprendra donc facilement qu'individuellement je n'ai pas dû trouver de difficulté à prononcer d'après notre droit commun sur le titre des Demandeurs. Le jugement est formulé de manière à ne pas repousser l'idée qu'il serait fondé sur un droit exceptionnel. C'est pourquoi il est prononcé à l'unanimité, quoique les juges ne soient pas tous d'accord sur cette question controversée, chaque juge pouvant avoir son opinion particulière sur ce point.

Je juge donc la cause actuelle comme une action pétitoire, ou en revendication, et, d'après notre droit, j'ai examiné si les Demandeurs avaient ou non établi un droit de propriété, et j'ai dû considérer de suite les différents titres invoqués par eux. Ils semblent en invoquer douze. Ils ne devraient en avoir qu'un, et ce sera assez s'ils l'ont établi.

Le premier chef de demande, et le titre qu'on y énonce, quant à la partie de l'immeuble vendu par John Robertson à Patrick Robertson, je ne les reconnais pas. La déclaration invoque des principes que je ne puis reconnaître comme applicables ici; c'est sans doute le droit anglais, quoiqu'on ne le dise pas. (*Tenants in common.*)

Je passe au second, et c'est celui qui a attiré toute mon attention, dans la vue de rendre justice aux Demandeurs, si vraiment ils ont établi un titre. Ils n'y invoquent pas le droit anglais, quoiqu'en plaidant ils aient, par leurs avocats, donné à entendre que les différentes successions dont il y est question étaient réglées par ce droit; mais me trouvant d'un avis différent, j'ai dû voir s'il y avait là des allégués suffisants pour y trouver aux Demandeurs un titre d'après les lois du pays telles que je les comprends. Ainsi, lisant la déclaration, j'y vois récitée une concession royale à John Robertson, de terres dont celles revendiquées font partie; puis une vente par John Robertson à Patrick Robertson et aux enfants d'Alexander Robertson, en paiement d'une dette dont moitié appartenait aux héritiers d'Alexander Robertson. Il n'est pas difficile d'un conclure que cette acquisition était pour moitié aux enfants de ce dernier. Voilà le titre de la Demanderesse, Elizabeth

Robertson, et de Catherine A. Robertson, sa sœur, dont elle a ensuite hérité. Quant à la moitié acquise par Patrick Robertson, il est dit qu'elle a passé par succession à Neil, son frère, et puis à Elizabeth Ann, la fille de ce dernier, et par la mort de celle-ci à la Demanderesse. Peut-être qu'en cela il y a erreur, et que, par la mort de Patrick, elle a passé et à son frère et à ses nièces. Mais ce n'est pas outrepasser le droit du juge que de considérer que le titre de la Demanderesse est établi par les faits allégués, quoique les Demandeurs ou leurs avocats aient suivi une différente ligne de succession, car le Défendeur n'a aucun intérêt dans la chose. Si l'action était une pétition d'hérédité, contre un Défendeur qui aurait des prétentions à cette hérédité, il y aurait sans doute quelque difficulté, mais il n'importe au Défendeur que la Demanderesse tienne de ses oncles ou de sa cousine, s'il suffit, pour ne pas refuser justice à un Demandeur, de reconnaître un titre bien prouvé par les faits allégués. J'ai donc examiné, d'abord, l'acte de vente par John Robertson, le concessionnaire de la couronne, que j'ai dû, d'après mes idées de la loi, trouver en bonne forme. Le fait est que c'est le titre invoqué par les deux parties. L'objection qu'on a faite à ce titre des Demandeurs est le défaut de tradition, je la rejette entièrement, d'abord, parce que ce n'est ni le Défendeur ni son auteur qui puissent invoquer un pareil moyen. L'on se rappelle la décision dans la cause de *Stuart* et *Ives* (en cette cour, en mars 1851), (1) quant à la nécessité de la tradition en pareil cas ; je considère cette décision (dans laquelle j'ai concouru) comme établissant, en principe, particulièrement à l'égard des terres incultes, que la tradition réelle est souvent impossible. Je dois dire, en même temps, que je ne fais aucun cas de la tradition symbolique qu'on a invoquée. La clause de saisine et la remise des titres n'est rien par rapport à des tiers, et ce que l'on trouve à ce sujet dans les livres n'a d'application qu'au vendeur qui se dessaisit ; mais si ce vendeur vend à un autre qui prenne possession avant le premier acquéreur, la loi *quoties* aura son effet, et cette dessaisine au contrat et la remise des titres ne pourra préjudicier, suivant moi, à ce second acquéreur de bonne foi du même vendeur. Mais ici le Défendeur en invoquant le défaut de tradition, qui, dit-il, a empêché la vente de transmettre la propriété, n'a pu le faire que comme étant aux droits de Madame veuve Robertson et de ses enfants, ses vendeurs, et c'est ici qu'avec le titre en main, la clause et la remise des titres, les Demandeurs sont en force pour résister à la prétention de cette veuve et de ces enfants, successeurs du vendeur John Robertson, car par rapport à lui, il n'était pas besoin de tradition réelle. Qui

(1) 1 *R. J. R. Q.*, p. 452.

a jamais entendu dire que, dans une action en revendication, par un acheteur contre un vendeur, celui-ci pouvait dire en défense : " Je vous ai vendu, mais je ne vous ai pas livré " possession, et je conclus au débouté de l'action, parce que vous " n'êtes pas devenu propriétaire, et que moi je suis demeuré et " suis encore *dominus rei.*" Eh bien ! ce serait là la prétention de la veuve Robertson et de ses filles, qui est aussi insoutenable en droit qu'elle serait de mauvaise foi, surtout de la part de la veuve, qui elle-même a vendu comme mandataire de son mari, pour un prix qui a été payé, c'est-à-dire, moyennant l'extinction d'une dette reconnue. Mais il y a plus, c'est qu'il est prouvé que les acquéreurs ont pris possession par l'acte d'un curateur à la succession vacante de l'un des acquéreurs, ce qui suffit ; car le curateur représente les héritiers, il n'est pas vrai de dire qu'il représente les créanciers, quoiqu'il leur soit comptable, tant que l'héritier n'a pas renoncé. Il y a des autorités formelles à ce sujet. (1) Bien loin donc que la possession du curateur soit une interruption de celle de l'héritier, c'est la possesion même des héritiers qui n'ont pas renoncé et qui acceptent plus tard.

Sous ces différents points de vue, je considère que l'achat par Patrick Robertson et les enfants d'Alexander Robertson, a été suivi de tradition, autant qu'il était nécessaire pour le faire valider, surtout lorsque l'on n'oppose pas possession contraire, ou l'intérêt de qui que ce soit à invoquer le défaut de tradition, c'est le sens du jugement dans la cause de *Stuart* et *Ives.*

La cour trouve suffisante la preuve de la transmission à la Demanderesse de la moitié du bien qu'avait Patrick Robertson et de celle de Catherine Ann Robertson. Il y a eu des objections à cette preuve, mais elles n'étaient pas de nature à arrêter l'attention d'un tribunal comme les nôtres en Canada, où la justice doit prévaloir sur les subtilités qui ont un caractère de chicane. C'est dans le second chef de demande que se trouvent les allégués d'un titre par succession en faveur de la Demanderesse, quant à ce qui avait appartenu à Patrick Robertson. Il y a bien le troisième chef qui veut que la vente ait été d'un tiers seulement à Patrick Robertson ; c'est une erreur, suivant moi ; et cette prétention, quand elle serait fondée, ne changerait pas l'état de la question, le titre de propriété de la Demanderesse serait également établi.

Quant aux 4e 5e et 6e chefs, je ne les reconnais nullement comme donnant titre valable, et je les rejette totalement.

Viennent ensuite les 7e et 8e chefs, tous deux invoquant titre par prescription, acquise avec titre suivie d'une possession pai-

(1) Pothier, *Obligations*, n° 12 ; Dénizart, *vbo* curateur, p. 588 ; 4 Toullier, n° 401 ; Répert. de Juris., *vbo* curateur, p. 197.

sible et publique de dix, et de vingt années, l'un des meilleurs titres que l'on puisse invoquer ; mais singulèrement l'on n'y dit pas en quoi consiste ce titre, et c'est une omission qui serait probablement fatale dans une action pétitoire, où il n'y aurait d'autre allégué de titre que l'assertion qu'on en a un. Aussi, je ne pourrais me résoudre à donner jugement aux Demandeurs dans une demande ainsi motivée, quand même les Demandeurs produiraient des actes, ou autres titres translatifs de propriété, qu'ils n'auraient pas invoqués. Je fais ces observations pour faire connaître que ce n'est pas sur le 7e ni sur le 8e chef de demande que je reconnais le titre des Demandeurs comme établi, et que, je suis d'avis que le titre est la base d'une telle demande, et non la possession de 10 ans, qui n'est qu'une confirmation du titre pour exclure toute contestation, et qui sert au détenteur de fin de non-recevoir, car tel est suivant moi l'esprit de la Coutume et de l'article 113, que tout le monde connaît. J'admets cependant que sur un titre suivi de possession de dix ans, d'après cet article, l'on peut intenter action en revendication après dépossession de plus d'an et jour. Les observations qui précèdent s'appliquent également aux 9e et 10e chefs, fondés sur une prescription avec possession de vingt ans, avec titre sans spécifier quel titre. Je m'explique à ce sujet, parce que je ne suis pas d'avis qu'il en soit de même sur un titre acquis par simple possession trentenaire, d'après le 118 Art. de la Coutume. Cette prescription a un tout autre caractère ; elle ne donne pas titre au possesseur de mauvaise foi sans titre ; elle le maintient dans sa possession, et cela, sur un principe de bon ordre social, fondé sur l'abandon que le véritable propriétaire est censé avoir fait de sa propriété. Je tiens donc que les 11e et 12e chefs de demande n'exposent aucun titre pour revendiquer, après avoir perdu la possession par plus d'un an et jour, autrement il faudrait accorder cette revendication après vingt-neuf années ; ce qui fait mieux comprendre pourquoi celui qui a possédé trente ans, sans titre, n'a pas l'action pétitoire, quoiqu'il ait titre pour se faire maintenir en possession quand on veut l'évincer ou le troubler. Je sais que l'on m'opposera que la prescription est un moyen d'acquérir, cela est vrai ; aussi, pour la défense, le possesseur trentenaire a un titre et une exception valable. Mais s'il perd sa possession, par un abandon de plus d'une année, il est censé avoir de son plein gré abandonné son titre avec sa possession. Voilà mon opinion sur la simple lecture de ces chefs de la demande. Je n'émets ici qu'une opinion, et comme elle peut paraître nouvelle, je serai prêt à la reviser, quand elle s'élèvera et qu'il faudra juger la question.

Mais il y a une autre objection aussi forte au mérite ; si les Demandeurs n'avaient aucun titre de propriété, ils n'ont pas fait preuve de cette possession publique et ouverte requise par

l'article 118 de la Coutume. Pour acquérir ainsi le bien d'autrui, il faut une possession ouverte, publique et connue, qui fasse présumer un abandon par le propriétaire ; une possession feinte, symbolique ou autre, de terres incultes et inhabitées, est loin de remplir l'intention de la loi telle que je l'entends. Ainsi donc, suivant moi, les Demandeurs auraient failli dans leur preuve de possession valant titre, deuxième motif pour rejeter la prétention d'un titre par prescription trentenaire.

Maintenant c'est au Défendeur à combattre le titre des Demandeurs, et il le fait par nombre d'exceptions. Mais j'ai déjà exprimé mon opinion sur plusieurs, nommément sur celles qui sont applicables aux titres invoqués par les Demandeurs ; ce qui reste a rapport à la validité du titre du Défendeur lui-même, savoir, s'il doit prévaloir ; puis la question d'enregistrement qui demande considération, et enfin celle des impenses, comme question subsidiaire.

Le Défendeur prétend que le défaut d'enregistrement par les Demandeurs de leur titre (par quoi, je suppose, l'on entend la vente par John Robertson en 1804, qui en est la base) fait, que l'acquisition par le Défendeur, au moyen d'un titre duement et préalablement enregistré, doit prévaloir et le maintenir contre l'action actuelle en éviction.

Et d'abord je dois dire sur cette question, que je crois devoir la juger, d'après la doctrine suivie en ce pays, d'après l'esprit de nos lois, et non d'après la doctrine admise en Angleterre, et c'est ici que l'on doit encore observer, que, quand même la tenure de *franc et commun soccage* serait réglée par le droit anglais, je veux dire depuis 1826, l'acte de la 6e Geo. IV n'a introduit qu'une partie du droit anglais, nommément quant au mode d'aliénation, aux successions et au douaire, et c'est un des raisonnements que j'ai trouvé bien fondés pour exclure toute idée de l'existence du droit anglais, comme droit commun, quant à ces terres : ce statut ne l'ayant introduit ou reconnu qu'en partie, en le limitant à ces trois objets qu'il avait en vue. Singulière manière de déclarer l'existence d'un droit qui, s'il existait, devrait exister en entier, de manière à régler les actions et tous les litiges qui pourraient s'élever à l'égard de ces terres.

Tout ce qui a été cité du droit anglais ne sera donc reçu que comme raisonnement et non comme autorité, et il faudra s'en tenir à notre droit. Est-il vrai, comme on l'a prétendu, que la plus insigne mauvaise foi dans un acquéreur qui enregistre, dans le cas où il a acheté d'un individu qu'il sait n'être pas propriétaire, quand il connaît lui le propriétaire qu'il veut évincer, ne peut être opposé, et qu'on n'en peut pas faire une question ?

En parlant de cet acquéreur de mauvaise foi, peut-être ai-je

parlé du Défendeur, car on lui fait cette imputation, non sans quelque raison.

Je n'ai rien trouvé de satisfaisant dans les auteurs cités, pour établir cette proposition,que la mauvaise foi,ou la connaissance du titre du propriétaire, ne nuit pas. Je suis fort tenté de reconnaître les citations anglaises comme devant avoir un grand poids et un grand effet sur mon esprit; mais il n'est pas nécessaire d'y avoir recours comme doctrine. Il y a des principes de raison et de justice qui sont de tous les pays, et, en fait d'enregistrement, il est un principe, c'est que le but est de confirmer et de maintenir l'acquéreur de bonne foi, autrement la loi serait immorale. L'on a beau dire que la loi a un intérêt public, à la bonne heure, c'est du bon ordre et de la paix sociale, mais cela ne va pas jusqu'à protéger l'usurpateur. Il n'y a de ce genre que la loi de prescription contraire, qu'on a nommée la loi du voleur, mais le principe en est différent. Là, c'est un abandon, pendant trente ans, qui fait présumer que le propriétaire n'y a plus de prétention, ou a voulu en faire don au possesseur. Ici, il ne s'agirait que d'un jour d'oubli pour faire perdre au propriétaire son bien. L'on a fait comparaison du nouvel acquéreur au nouveau créancier qui enregistre, et cela au préjudice du plus ancien; mais la comparaison n'est pas juste, car ce nouveau créancier ne fait qu'assurer sa dette, et ce n'est pas à lui à veiller aux intérêts d'autres créanciers, qui, après tout, peuvent avoir d'autres sûretés que l'hypothèque.

Je considère qu'il est établi par la preuve, que le Défendeur savait que le bien appartenait à la Demanderesse, et cela par la connaissance qu'il avait de la vente par le major Robertson, de la veuve duquel il se proposait d'acheter, et il n'achète que lorsque le temps d'enregistrer est expiré, afin d'enregistrer lui-même son acquisition et évincer le propriétaire. Ainsi ce n'est pas seulement connaissance du titre d'un autre, c'est fraude et collusion avec le premier vendeur ou ses représentants, pour priver un tiers de son bien. Or, jamais loi n'a pu être faite pour donner effet à un pareil complot. Dès avant le temps de son acquisition, il avait bien déjà pris possession, connaissant l'absence des Demandeurs, mais il n'osait prendre un titre que lui offrait la veuve Robertson; il attendait l'époque à laquelle j'ai fait allusion. Il achète le 2 août 1830, et treize jours après il enregistre son contrat d'acquisition. Les Demandeurs n'ont enregistré leur titre qu'en 1834, à leur retour d'Europe.

Il est nécessaire de regarder aux statuts sur lesquels le Défendeur fonde sa prétention, c'est, d'abord, la 10e et 11e Geo. IV, ch. VIII (1830), section 3e. " That all acts or deeds in " law or instruments in writing, which may convey, alienate, " bind or affect any immoveable property, held in free and

" common soccage, or otherwise, within the counties aforesaid, " made and executed from and after the passing of this act, " shall be duly enregistered... and that no such act, or Deed, in " law, &c., shall be binding, or have any force or effect, as a " transfer, conveyance, &c., until the same shall have been so " duly enregistered." Puis la 1ère Guil. IV, ch. III, sec. 4 (1841.) " That from and after the passing of this act, no act, or deed, " in law, &c., shall operate or bind, as a conveyance, any land " or immoveable property, &c., unless the said act, deed, &c., " be enregistered, etc., within one year from and after the pas- " sing of this act. (31st March, 1831.") Par la 2e clause, il y avait délai, pour les actes antérieurs au premier statut, jusqu'au 1er mai 1832, ce qui doit s'appliquer, en vertu de la 3e clause, au comté de l'Outaouais.

L'on a prétendu que l'absence des Demandeurs, lors de la passation de ces lois, les protégeait contre la déchéance voulue ; mais je ne puis reconnaître ce principe. Le seul doute qui pourrait exister, serait par rapport à ces acquisitions suivies de dix ans, et même plus, de possession ; savoir si ces possesseurs avec titre valable seraient sujets à être évincés par un acquéreur d'hier, car la prétention du Défendeur va jusque-là. Le titre des Demandeurs date de 1804, ce n'est qu'en 1833 que le Défendeur achète, et cela de personnes qui n'étaient pas propriétaires, comme nous le verrons dans un instant ; et cependant ce possesseur, avec titre datant de vingt-neuf années, devra être évincé ; car, si aujourd'hui le Défendeur a l'exception pour résister à l'action des Demandeurs, il aurait aussi l'action pour évincer les Demandeurs, s'il étaient en possession. Les Demandeurs, s'ils étaient propriétaires, lors de l'acquisition du Défendeur (et qui peut en douter ?), n'ont pas perdu leur bien, parce qu'en leur absence un individu s'est mis en possession et détient leur héritage. Au mot " rétroactif," dans le Répertoire de Merlin, il y a un excellent article à méditer sur l'effet même des lois rétroactives. Mais, sans entrer dans cette question, si un citoyen, jouissant d'un bien avec titre, peut être ainsi évincé, ce qui semblerait n'en devoir pas en être une, je trouve qu'on ne s'est pas assez appuyé sur le droit de protection due à ce propriétaire à l'encontre d'une loi. Car la loi ne peut faire perdre des droits acquis. Voici le passage de Merlin, section 3, § 3, p. 536. " Comment la loi pourrait- " elle changer le passé, au préjudice de personnes à qui elle " enlèverait des droits acquis ? C'est à leur égard que le prin- " cipe de la non-rétroactivité est établi, pour les mettre à " l'abri des atteintes que le caprice du législateur pourrait " leur porter. " Plus loin. " Les droits acquis sont ceux qui " sont entrés dans notre domaine, &c." Mais, dira-t-on, le bien public veut qu'on enregistre même les anciens titres, et, dès

lors, il y a pouvoir de l'ordonner. Passe de *l'ordonner*; mais la pénalité sera-t-elle la perte de bien dont on jouit par soi et ses ancêtres, depuis plus d'un siècle ?.....Je comprends que, s'il n'y a pas jouissance ou possession actuelle, il y aurait quelque chose à dire en faveur d'un acquéreur de bonne foi. Mais cette discussion mènerait trop loin, bornons-nous au cas actuel. Il y avait droit acquis incontestablement. Quant à la possession, elle n'était pas aussi publique qu'elle eût dû l'être. Mais le titre du Défendeur pèche par un autre vice ; il a acquis *a non domino* : et pour qu'il pût invoquer un titre il faudrait que la rétroactivité de la loi eût annulé l'acte de vente par Madame Robertson, comme procuratrice de son mari, en 1804, qui alors a eu tout son effet comme contrat, c'est-à-dire, de transférer la propriété aux acquéreurs, et, tant que cet acte sera valable, les Demandeurs auront un titre valable, à l'encontre de leur *vendeur*, leurs hoirs et ayants cause. *Vide* Martin, p. 538. Les contrats sont hors de l'atteinte des lois postérieures, parce que tout contrat forme un bien légal, &c., et il en résulte un droit acquis.

La loi qu'on invoque ne dit pas que le propriétaire qui n'a pas enregistré perdra son bien, mais " That no act or deed " shall operate, or bind, as a conveyance, any land or immo- " veable property, unless the same shall be registered within " one year from the passing of the act." Evidement cela ne s'applique qu'aux actes qui n'ont pas déjà eu l'effet de transmettre la propriété à l'acquéreur ; une tout autre interprétation serait absurde. L'acte de vente en question avait eu son effet en 1804, et le 31 mars 1832, il l'avait encore est-ce que tout à coup la propriété a cessé ?

Mais le Défendeur a prétendu que la veuve et les enfants de John Robertson étaient demeurés les propriétaires, faute d'exécution de l'acte de 1804, nécessaire pour le rendre valable. S'il eût pu établir ce fait, il en eût fait la base d'un raisonnement logique, au soutien de sa défense ; mais cette base lui manque. Nous avons déjà émis l'opinion que la Demanderesse a établi son titre, cela ne peut pas être vrai, sans que la propriété ait passé des mains de John Robertson, le vendeur de 1804, et, dès lors, la veuve n'avait aucune propriété, non-plus que leurs enfants.

J'observe que ce n'est pas sur la loi *quoties* qu'on s'est fondé. Le Défendeur n'avait pas, non plus, acheté du même vendeur, quoiqu'il ait acheté de ses ayants cause ; au cas où *il fût demeuré propriétaire*, ce serait une tout autre question. Mais le Défendeur est réduit à prétendre qu'un acte qui a eu son effet pendant 28 ans, est comme non avenu ; prétention suivant moi aussi absurbe qu'elle serait injuste. Le passé n'est pas dans le domaine de la loi ; elle ne peut pas dire que ce qui

a eu lieu n'a pas eu d'existence, une expropriation semblable n'a jamais pu être dans l'intention du législateur.

Il y a nombre d'actes auxquels la loi est applicable, et cela suffit pour l'interpréter d'une manière raisonnable, là où l'on veut lui donner l'effet d'une expropriation, quoiqu'injuste, tel que les contrats non exécutés, les donations, dons mutuels douaires et autres droits éventuels, tous actes requérant insinuation, tous actes créant hypothèque ou affectant autrement les immeubles au préjudice des tiers. Mais une vente qui a eu l'effet de transporter la propriété ne peut pas tomber dans l'intention de la loi. Il n'y a dans la loi qui nous occupe rien de rétroactif, rien qui puisse avoir l'effet de dépouiller un individu de son bien. Il est utile que cette manière de voir soit adoptée pour tranquilliser les citoyens, dont beaucoup sans doute, se croyant en sûreté, n'ont pas jugé à propos d'enregistrer de vieux titres.

J'avoue que je trouve étonnant qu'on ait pu faire de cette cause un litige aussi important. Je ne trouve pas au Défendeur l'ombre d'un titre ; et, quant aux Demandeurs, si leur demande a donné lieu à tant de difficulté, c'est parce qu'on n'a pas jugé à propos de la motiver avec la simplicité de nos actions. La Demanderesse a acquis par un titre valable une partie de l'immeuble, le reste par succession ; la preuve en était toute simple, et le jugement devait s'en suivre. Mais l'on a motivé douze demandes, où l'on a invoqué douze titres différents. Le titre des Demandeurs est bon suivant les deux systèmes de lois, le droit anglais comme le droit français. Qu'importe au Défendeur ? Doit-il profiter de ce qu'il s'est élevé un doute sur le droit qui régit cette terre, et garder ainsi le bien d'autrui ? Non. J'avoue que j'ai eu quelque difficulté à trouver un de ces chefs de demande tout à fait satisfaisant, mais si je n'en étais pas venu à considérer le deuxième chef comme suffisant, avec notre manière équitable d'administrer la justice, j'aurais débouté l'action, sauf à se pourvoir. Car le bien me paraît appartenir aux Demandeurs, et non au Défendeur qui n'y a aucun droit, d'après la preuve.

Quant à l'exception modificative, nous avons ordonné une expertise. Les auteurs sont partagés sur la question de savoir si le possesseur de mauvaise foi peut réclamer ses impenses, qui sont des améliorations : quelques-uns veulent qu'il ne le puisse au-delà des fruits par lui perçus ; d'autre que le propriétaire ne peut pas s'enrichir du bien d'autrui, (1) d'après la maxime " *Nemo locupletari, &c.*" Mais comme il faut une expertise pour les fruits, nous en aurons une pour les impenses. Le jugement est motivé de manière à ce que la cour puisse, plus tard, se prononcer sur cette question.

(1) V. art. 417 C. C.

PANET, juge : Cette action n'appartenant qu'au propriétaire fondé en titre, la première chose à faire est d'examiner le titre des Appelants ; car si leur titre était insuffisant, le Défendeur, Intimé, aurait gain de cause, sans même de défense de sa part, selon la règle si connue *actore non probante, &c.* J'examine donc en premier lieu les titres sur lesquels s'appuient les Appelants. Ce sont, d'abord, les lettres patentes du 20 novembre 1799, constatant un octroi de deux mille acres de terre, en franc et commun soccage, à John Robertson, qui, le 15 octobre 1804, vendit par acte devant notaires, à Patrick Robertson, son frère, et à Élizabeth et Catherine Ann, enfants mineurs d'Alexander Robertson, aussi son frère. Patrick Robertson mourut le 16 mars 1808, laissant Neil Robertson, son frère aîné, qui lui-même mourut le 18 juin 1813. Catherine Ann mourut ensuite le 16 août 1823, laissant Élizabeth Robertson, l'Appelante, la seule survivante, et les représentant en fait de succession, soit que l'on considère le droit anglais ou le droit français, ce qui n'a pas empêché que l'on s'en soit fait une question épineuse, dans la cour dont le jugement nous est maintenant soumis. A mon avis, l'on s'est beaucoup plus étendu qu'il n'était nécessaire sur la difficulté. En généralisant la proposition, on lui a donné une portée bien grande, et l'on a parlé de l'introduction des lois civiles anglaises en général dans une partie du pays tandis que, réduite à sa plus simple expression, il s'agissait de savoir si la couronne avait ou non droit de concéder sous une tenure, en préférence à une autre tenure, en la tenure en franc et commun soccage, de préférence à l'ancienne tenure en usage dans le pays avant la conquête. Ainsi posée, la question n'était pas susceptible de grande difficulté et il ne s'agissait plus que de savoir ce que c'était qu'une concession en franc et commun soccage, et quels incidents et conditions découlaient de la nature de cette tenure. De là, comme conséquence de cette tenure, l'on regardait que les règles d'aliénation et de succession du droit anglais se trouvaient nécessairement introduites. Cependant, dans l'usage, les propriétaires des terres tenues en franc et commun soccage ne se sont pas conformés à ces règles, et il s'est élevé de grands doutes relativement à leur propriété. Chacun voyait la difficulté selon ses préjugés, ses prédilections politiques, et son intérêt particulier. La Législature impériale, au moyen d'une clause intercalée dans l'acte 6 Geo. IV, ch. LIX, s'est prononcée de manière à empirer les choses, et à rendre tout à fait incertains les droits acquis des propriétaires de terres ainsi tenues. Cependant, l'acte s'exprimant au futur (shall) son effet est resté douteux, quant aux aliénations, successions, &c., qui avaient eu lieu avant l'acte. Enfin, fut passé l'acte provincial 9 Geo. IV, ch. LXXVII, qui fût réservé à la sanction de Sa Majesté, et qui a été sanctionné en vertu de l'acte impé-

rial 1 Guil. IV, ch. XX. Je viens, de suite, à cet acte pour occuper moins de temps, et parce que, suivant moi, cet acte à l'effet de trancher le nœud gardien, et qu'il suffit pour établir que les règles de notre droit sont applicables à la cause qui nous est soumise.

L'Acte constitutionel, 31 Geo. III, ch. XXXI, s. 32, déclarait " qu'un bill qui sera remis à la signification du plaisir de Sa Majesté sur icelui, n'aura aucune force ni autorité, dans l'une ou l'autre des dites provinces, respectivement, jusqu'à ce que le gouverneur, ou le lieutenant-gouverneur, ou la personne qui aura l'administration du Gouvernement, signifie, soit par harangue, ou message au Conseil législatif et à l'assemblée de telle province, ou par proclamation, que tel bill a été mis devant Sa Majesté en conseil, et que sa Majesté a bien voulu l'approuver, et qu'il sera fait une entrée dans les journaux du dit Conseil législatif de chaque telle harangue, message ou proclamation, dont un duplicata, duement attesté, sera délivré à l'officier proposé pour être conservé parmi les registres publics de la province. Et que tel bill, qui sera remis comme ci-dessus, n'aura aucune force ni autorité, dans l'une ou l'autre des dites provinces respectivement, à moins que l'approbation de Sa Majesté sur icelui ait été signifiée, comme ci-dessus, dans l'espace de deux années du jour que tel bill aura été présenté pour l'approbation de Sa Majesté, au gouverneur, lieutenant-gouverneur ou à la personne qui aura l'administration du gouvernement de telle province." Or, l'acte provincial 9 Geo. IV, ch. LXXVII, ayant été ainsi remis à la signification du plaisir de Sa Majesté, n'a été approuvé qu'après l'expiration des deux années ci-dessus mentionnées ; ce bill avait été ainsi réservé, et, suivant toute probabilité, était encore dans les délais, lorsque, dans le Parlement impérial, fut passé, il semble tout exprès, l'acte de la 1ère Guil. IV, ch. XX, pour autoriser la sanction " d'aucun bill ou d'aucuns bills, qui a, ou qui ont ci-" devant, ou qui pourront ci-après être passés par la Légis-" lature," et il est ajouté les mots suivants : " any repugnancy, " or supposed repugnancy, of any such regulations to the law " of England, or in any of the provisions in the before recited " acts of parliament, or either of them, contained, to the con-" trary in any wise notwithstanding." Or quels étaient les actes *before recited* ? l'un deux était la 31e Geo. III, ch. XXXI dont la 32c clause précipitée porte la limitation des deux années qui fait la difficulté. Maintenant, que l'on remarque que l'acte qu'il s'agissait de sanctionner, et que la Législature impériale autorisait, il semble à tout prix, de sanctionner, ne voulant admettre aucune excuse ou prétexte pour s'y refuser, est un acte souverainement avantageux, qui lève tous les doutes et remedie à tous les inconvénients. Dans le préambule, on lit :

" Whereas it is necessary and expedient to make provision for " quieting the lawful proprietors of such lands, and confirming " to them the legal possession and enjoyment of the same, &c. " &c." Puis cet acte confirme les ventes faites, quoique non suivant les lois d'Angleterre, et il statue qu'à l'avenir les ventes pourront se faire selon les lois d'Angleterre, ou selon celles de la province, enfin, que, lorsqu'un propriétaire de terres, tenues en franc et commun soccage, dans la province, sera décédé, avant la passation du dit statut, sans les avoir partagées par testament ou autrement, les héritiers de tel propriétaire seront tenus de partager tels biens selon l'ancienne loi du pays, à moins que les dits héritiers soient convenus de les partager différemment.

Tel était le bill qu'il s'agissait de sanctionner, mais, comme il n'était pas nommément mentionné dans l'acte qui en autorisait la sanction, l'on a objecté que l'on pourrait abuser d'une désignation aussi générale. Pour que cette objection fût de quelque poids, il faudrait dire quel autre bill le gouverneur eût pu sanctionner. Il n'y en a aucun auquel l'indication de l'acte impérial peut convenir. Les autorités coloniales ne conçurent aucun doute sur l'interprétation de ce statut (1 Guil. IV, ch. XX.) Le bill fut sanctionné par une proclamation, dont un duplicata duement attesté est conservé, suivant la loi, dans les registres de la province. D'où je conclus que cet acte provincial, 9 Geo. IV, ch. LXXVII, fait partie de nos lois et est obligatoire. Or, nous avons vu que cet acte confirme les ventes faites, quoique non suivant les lois d'Angleterre, des terres tenues en franc et commun soccage. Le premier obetacle relatif au système de lois applicable à la présente cause étant ainsi surmonté, je continue d'examiner les titres des Appelants.

L'acte d'acquisition faite par Patrick Robertson et ses nièces, filles d'Alexander Robertson, est une veute notariée portant date de l'année 1804, que l'Intimé impugne d'inefficacité, d'abord pour n'avoir pas été suivie de tradition réelle, (1) et, en second lieu, pour n'avoir pas été enregistrée dans le temps voulu par la loi, et avant le sien.

Quant à la tradition, il y a eu dans ce cas-ci tradition symbolique, par la remise d'une copie des lettres patentes, et du *diagram* du township Buckingham. Notre ancien droit français avait adopté la règle du droit romain *traditionibus domina rerum, non nudis pactis transferuntur. L. 20 Cod. de pactis.* Et la raison de ce principe était, prétendait-on, qu'il est de la nature du domaine de propriété de s'acquérir par la possession *dominium à possessione cœpit.* Qu'il est de la nature des conventions de ne créer que des obligations. Malgré

(1) V. art. 1472. C. C.

tout cela, plusieurs auteurs qui ont écrit sur le droit naturel prétendent que ce principe du droit romain, que le domaine des choses ne peut passer d'une personne à une autre que par la tradition, n'est point pris dans la nature ; que c'est un principe du droit purement positif qui n'a été attribué au droit des gens qu'improprement, parce qu'il a été reçu de plusieurs nations, mais que, dans les purs termes du droit naturel, rien n'empêche que la convention que j'ai avec vous qu'une telle chose cessera dorénavant de m'appartenir et vous appartiendra ne vous en transfère aussitôt la propriété, même avant que je vous en aie fait la tradition. Le domaine d'une chose étant essentiellement le droit d'en disposer comme bon nous semble, c'est une suite de ce droit que j'ai de disposer de ma chose comme bon me semblera, que je puisse par ma seule volonté et sans aucun fait, transférer le domaine de cette chose à telle personne que bon me semblera qui voudra bien l'acquérir, ces raisons sont d'un certain poids ; elles ont dû avoir quelqu'influence dans l'interprétation de la loi. De là, sans doute l'origine des traditions feintes, des traditions symboliques qui se faisaient *nudâ voluntate*, par le seul consentement des parties, et qui semblaient donner virtuellement le démenti à la règle absolue *traditionibus, &c.* La remise des clefs tenait lieu de tradition des marchandises tenues dans un magasin, mais il fallait qu'elles fussent remises *in re præsenti, apud horrea.* Pothier pensait que selon nos usages cela n'était pas nécessaire, puis il dit : " La remise des titres passe aussi pour une tradi-" tion symbolique de la chose. " (1) C'est ce qui a eu lieu dans le cas présent. Je ne pense pas devoir beaucoup m'occuper du défaut remarqué quelque part que les lettres patentes n'étaient pas régulièrement certifiées. Les inexactitudes n'empêchaient pas que ce ne fût un juste titre tel qu'exigé par la loi pour prescrire. Le vendeur était propriétaire en possession et saisine, et la tradition symbolique était suffisante. Mais il y a plus ; il est prouvé que cette tradition symbolique, longtemps avant qu'aucune prétention adverse ait été émise, a été suivie d'actes de possession non équivoques par les acheteurs, je veux parler des actes de Sutherland, curateur à la succession vacante de Patrick Robertson. Il est de principe que la possession du défunt se transporte sans interruption sur la tête de son successeur, même avant que ce dernier ait eu connaissance de l'ouverture de la succession et ait pu avoir la volonté de l'accepter. Il faut même dire que, si la succession était vacante, la possession ne se prolongerait pas moins, quoiqu'une succession abandonnée soit un être moral incapable de volonté. La volonté du défunt, pour ainsi dire, fait partie de sa succession.

(1) Pothier, *Vente*, N° 314.

Ainsi, les Appelants, en faisant preuve de la curatelle, n'ont certainement pas prouvé une interruption de possession, mais tout au contraire. (1) Une fois la propriété acquise, il est de son essence de se perpétuer et d'avoir une durée indéfinie. L'intention suffisait pour retenir la possession acquise, il n'était pas nécessaire que cette intention fût toujours vigilante et active, elle persévérait tant qu'une volonté contraire ne venait pas la détruire et la remplacer. (2) Il y a, en outre, une distinction bien importante à faire entre le propriétaire non troublé qui néglige le soin de ses affaires, mais qui n'est jamais censé vouloir abdiquer son droit sur sa propre chose, et le tiers qui veut prouver par la possession un droit rival du droit d'autrui. Le premier peut se livrer à l'incurie, peu soucieux de ses propres intérêts, mais la possession originaire qui se sera fixée sur sa tête se perpétuera indéfiniment, tant qu'il ne se sera pas livré à des actes plus certains d'abdication de son droit. La continuité juridique de cette possession sera incontestable, et l'on ne sera pas fondé à exiger qu'il en ait donné au public des signes extérieurs ; puisque le public n'a élevé aucune prétention sur sa chose et que, ne le troublant pas, il est censé reconnaître en lui un propriétaire légitime. (3)

Il y a aussi une présomption dont il faut tenir compte, c'est que, si l'on possède avec un titre relatif à cette possession, on est censé avoir possédé depuis ce titre. Le titre est une explication de la possession ; il lui imprime son caractère, et c'est par lui qu'on juge de sa qualité. Le possesseur a son titre, il jouit *animo domini*, il n'en faut pas d'avantage, il y a présomption qu'il a toujours possédé, sans discontinuation, depuis la naissance du titre. C'est à celui qui conteste à prouver l'interruption. (No. 425, *loco citato.*) De ces principes applicables aux faits de la cause, il faut conclure que le titre de 1804, invoqué par les Appelants, est soutenu, non seulement d'une tradition symbolique, mais aussi d'une prise de possession, avant qu'ait surgi la prétention d'une possession adverse, c'est-à-dire, jusqu'au 2 août 1833, date du titre du Défendeur, qui établit que sa détention antérieure était de mauvaise foi, vice le plus ordinaire des possessions. Cette mauvaise foi, dit Pothier, n'est autre chose que la connaissance qu'a le possesseur que la chose qu'il possède ne lui appartient pas : c'est *scientia rei alienæ.* (4) A cette époque, les Appelants avaient pour eux tout le long espace de temps qui s'était écoulé depuis la date des let-

(1) Troplong, *Prescrip.*, n°s 265 et 266

(2) Idem, n° 264.

(3) Tropl., *Prescr.*, n° 327.

(4) Pothier, *Possession*, n°s 17.

tres patentes octroyées à leur auteur, savoir : 1799, c'est-à-dire plus de trente ans, et, à compter de 1804, époque de leur titre d'acquisition, plus de temps qu'il ne leur était nécessaire pour prescrire par dix ans, avec titre et bonne foi. Les Appelants se sont prévalu de ces deux moyens de prescription. L'on a objecté que la prescription n'était qu'une exception, qu'on ne pourrait l'employer que pour résister à une action, mais jamais pour expulser le possesseur par voie de demande. " Il est faux, dit Troplong, que la prescription ne soit qu'une excep-
" tion ; elle est un moyen d'acquérir, une cause investitive,
" qui peut servir de base à une action. Il n'y a que la pres-
" cription afin de se libérer qui soit une exception. Mais c'est
" une hérésie fondamantale de soutenir que celui qui a acquis
" par la prescription. n'a pas un moyen d'attaque, pour se faire
" réintégrer quand il a été dépossedé." (1) L'on objecte encore que les Appelants n'avaient pas droit de se servir de leur titre, lequel n'étant point enregistré est réputé nul.

Pour éclaircir ce point, enquérons-nous, d'abord, si les ordonnance d'enregistrement, la 10e et 11e Geo. IV, cap. VIII, (1830), et l'acte de la 1ère Guil. IV, ch. III (1831), qui en étend les dispositions aux terres tenues en franc et commun soccage dans les comtés des Outaouais, &c., sont ou non applicables au titre d'acquisition par prescription de dix et vingt ans. Ce titre est composé de divers éléments nécessaires pour sa perfection. Le titre seul, sans la possession, pendant tout le temps voulu par la loi, ne suffirait pas, non plus que la possession sans le titre. Concluons de là que l'ordonnance ne touche pas au titre d'acquisition par prescription et convenons aussi, que c'est une loi qui doit être interprétée strictement. Je vais plus loin, je dis que l'ordonnance, en statuant que " tout tel instrument légal, qui n'aura pas été
" ainsi enregistré, sera absolument nul, et n'aura aucun effet
" quelconque, contre tous ceux qui auront acquis subséquem-
" ment, moyennant valeur reçue," ne peut s'interpréter avoir voulu confirmer un faux titre, procédant d'une personne qui n'avait pas droit de l'accorder. Car, que signifie le mot acquérir, si ce n'est acquérir du propriétaire ? Sera-ce acquérir que d'acheter du premier venu qui n'est ni propriétaire ni possesseur ? C'est un principe que, si le vendeur n'est pas le maître de la chose, l'acheteur n'en est pas rendu le maître par la délivrance (L. 20, ff. de acq. rem Dom.) Le décret est une vente bien solennelle que la justice fait pour et au nom du saisi comme propriétaire et possesseur. Cependant, s'il n'est ni l'un ni l'autre, la vente est déclarée n'avoir point eu lieu, elle est nulle, et n'est point une acquisition par l'adjudicataire. Une vente,

(1) Troplong, *Prescrip.*, nº 50.

affectée d'une pareille erreur, passée par devant notaires, aura-t-elle plus d'effet que celle faite en présence d'une cour de justice ? Je ne le pense pas. La distinction d'un vrai d'avec un faux acquéreur est reconnue dans le droit civil, car, si la même chose était vendue à deux acheteurs, soit par un même ou deux différents vendeurs, le premier des deux à qui elle avait été livrée et qui était en possession était préféré, quoique la vente faite à l'autre fût précédente, si ce n'est que l'un des vendeurs ne fût pas le maître de la chose vendue et que l'autre le fût, car, en ce cas, celui qui avait acheté du maître était préféré à celui à qui la délivrance avait été faite. Telle est la loi 31 § 2 ff de act empt. et vend. " *Uterque eamdem* " *rem emit à non domino, cum emptio venditioque sine dolo* " *malo fieret, traditaque est : sive ab eodem emimus sive ab* " *alio, atque alio, is ex nobis tuendus est qui prior jus ejus* " *apprehendit, hoc est, cui primùm tradita est. Si alter ex* " *nobis à domino emisset, is omni modo tuendus est.*" De ce principe, dont chacun doit admettre et la justice et l'équité, il suit que, quoique la loi *quoties* fût si positive, si absolue à prononcer que, si contestation était mue entre deux acheteurs, la préférence devait être donnée à celui qui le premier avait été mis en possession. " *Quoties duobus in solidum prædium* " *jure distrahitur manifesti juris est cum qui priori tradi-* " *tum est in detinendo dominio esse potiorem.*" *L.* 15 *C. de rei. vend.* Cependant l'on faisait la distinction ci-dessus ; et qui ne voit que cette distinction ne fut nécessaire pour empêcher les fraudes ? Maintenant, raisonnant par analogie, je dis que nos lois d'enregistrement sont susceptibles de la même distinction, savoir : que de deux acheteurs, dont l'un a acquis du vrai propriétaire, l'autre d'une personne non propriétaire, le premier doit être maintenu dans son droit, quoique le second ait fait enregistrer son titre. A bien dire, il n'est pas acquéreur, il n'a pas de vendeur légitime à indiquer, ce n'est pas de lui, dont les ordonnances déjà citées ont voulu parler. Donnez une interprétation contraire à ces lois, et vous aurez à sanctionner les actes de spoliation les plus manifestes, car il eut suffit de se faire passer titre par le premier venu, et d'enregistrer, pour se faire livrer la terre de tout propriétaire qui n'aurait pas eu la prudence de faire enregistrer ses titres, qu'il croyait d'autant plus incontestables qu'ils remontent à une époque plus ancienne. La plupart des propriétaires de terres situées dans les localités dont il s'agit, troublés au moyen d'un titre, ainsi obtenu et enregistré, n'auraient d'autre moyen de protection que l'ancienneté de leur titre, c'est-à-dire, la prescription, titre d'acquisition qui ne tombe pas sous l'opération de l'ordonnance. Enfin, il y a un autre et dernier moyen qui empêche l'effet de l'enregistrement du titre de l'Intimé, c'est la mauvaise

foi et la fraude. Pour toutes ses raisons, j'ai dû acquiescer au jugement, tel qu'il vient d'être prononcé.

AYLWIN, Justice: I concur with my brethren in giving judgment for the Plaintiffs, but I arrive at the same conclusions by another way. The main question raised by the parties seems to me to be, whether the decision is to be governed by the rules of the law of England or by the common law of Canada. I am of opinion, that as the title to land held in free and common soccage is in issue, that title must rest on the law of England. The land which forms the subject in controversy was part of the waste lands of the Crown, and was originally granted by His Majesty King George the Third, by letters patent, under the Great Seal of the Province of Lower Canada, on the 29th May, 1799, to John Robertson, an ensign in His Majesty's late 84th Regiment of foot (from whom immediately Appellants derive their title), which contain a recital " that John Robertson had made and subscribed the decla-
" ration by our royal instructions in that behalf required,
" whereby he, John Robertson, doth promise and declare that
" he will maintain and defend, to the utmost of his power,
" the authority of us and of our Parliament as the supreme
" Legislature of our said Province, " And the royal grant is made " to be held of us, in free and common soccage, by
" fealty only in lieu of all other and all manner of rents,
" services, fines, rights, dues, duties, claims and demands
" whatsoever, *in like manner as lands are now holden in*
" *free and common soccage, in that part of Great Britain*
" *called England.*"

At the period of the conquest of Canada by the British Arms, the *Coutume de Paris* and the *droit commun de la France*, were the law of the land, and administered by tribunals regulated by the *Code civil*, or *Ordonnance* of 1667. It is well settled, that, " when a country is obtained by *con-*
" *quest* or *treaty*, the King possesses an exclusive prerogative
" power over it, and may entirely change or new model the
" whole, or part of its laws and political form of Government,
" and may govern it by regulations framed by himself. As,
" however, a country conquered by British Arms becomes a
" dominion of the King, in right of his crown, it is necessarily
" subject to the legislature of Great Britain; and, consequen-
" tly, His Majesty's Legislative power over it, as conqueror, is
" subordinate to his own authority in Parliament, so that His
" Majesty cannot make any new change, contrary to funda-
" mental principles, or exempt the inhabitants from the power
" of Parliament. Nor can the King legally disregard or violate
" the articles on which the country is surrendered or ceded;
" but such articles are sacred and inviolable, according to their

" true intent and meaning. It is necessary and fit that the " conquered country should have some laws, and, therefore, " until the laws of the country thus acquired are changed by " the Sovereign, they still continue in force." (1) It becomes necessary then to inquire whether the royal prerogative in this respect, was restrained by any articles of surrender or cession as to Canada. In referring to the capitulation signed at Montreal, the 8th September, 1760, we find, as article 41, proposed by the French commander, the Marquis de Vaudreuil, " The French Canadians and Acadians of what state and con- " dition soever, who shall remain in the colony, shall not be " forced to take arms against His Most Christian Majesty, or " his allies, directly or indirectly, on any occasion whatsoever; " the British Government shall only require of them an exact " neutrality." The answer to which by general Amherst is, " They become subjects of the King," The 42nd article is directly to the point; it was asked by the French: " The " French and Canadians shall continue to be governed accor- " ding to the Custom of Paris, and the laws and usages esta- " blished for this country; they shall not be subject to any " other imposts than those which were established under the " French dominion." The answer is: " Answered by the prece- " ding articles, and particularly by the last." The royal prerogative is thus clearly reserved in its plenitude, to the King of Great Britain. By the 5th article of the definitive treaty of peace, between the kings of Great Britain and France, dated at Paris, the 10th February, 1763, Canada was ceded to Great Britain "*in the most ample manner and form, without res-* " *triction.*" The sole covenant, on the part of Great Britain, is: " His Britannic Majesty, on his side, agrees to grant the " liberty of the Catholic religion to the inhabitants of Canada, " he will consequently give the most effectual orders that his " new Roman Catholic subjects may profess the worship of " their religion, according to the rites of the Romish Church," but, even this is limited expressly by the words immediately following "*as far as the laws of Great Britain permit.*" Upon the conquest of the country, general Murray established military tribunals, which dispensed justice both in civil and criminal matters, according to their own rule of natural equity and right, and the whole system of courts and administration of justice, as practised under the French Government, ceased for ever. On the 7th October, 1763, by proclamation given, at the court, at St. James, the King published and declared that he had granted his letters patent under the Great Seal of Great Britain, for the erection of four distinct and separate govern-

(1) Chitty, on Prerogative, 29.

ments, out of the acquisitions secured to him in America by the Treaty of Paris. The first of which was "The Government "of Quebec," comprising all Canada. This proclamation countains the following important declaration: "Whereas it will "greatly contribute to the speedy settling our said new govern-"ments, that our loving subjects should be informed of our "paternal care for the security of the liberty and properties "of those who are, and shall become inhabitants thereof; we "have, in the letters patent under our seal of Great Britain, "by which the said governments are constituted, given express "power and direction to our governors of our said colonies "respectively, that so soon as the state and circumstances of "the colonies will admit thereof, thay shall, with the advice "and consent of the members of our Council, summon and call "general assemblies within the said governments respectively, "in such manner and form as is used and directed in those "colonies and Province of America, which are under our imme-"diate government; and we have also given power to the said "governors, with the consent of our said councils, and the "representatives of the people, so to be summoned as afore-"said, to make constitute and ordain laws, and statutes and "ordinances for the public peace, welfare and good govern-"ment of our said colonies, and of the people and inha-"bitants thereof, *as near as may be agreeable to the laws of "England, and under such regulations and restrictions as are "used in other colonies; and in the mean time, and until "such assemblies can be called as aforesaid, all persons inha-"biting in, or resorting to our said colonies may confide in "Our Royal Protection for the enjoyment of the benefit of the "laws of our Realm of England; for which purpose, we have "given power under our Great Seal to the Governors of our "said colonies respectively, to erect and constitute, with the "advice of our said councils respectively, courts of judicature "and public justice within our said colonies, for the hearing "and determining all causes, as well criminal as civil, accor-"ding to law and equity, and, as near as may be, agreeable "to the laws of England, with liberty to all persons, who may "think themselves aggrieved by the sentence of such courts, in "all civil causes, to appeal, under the usual limitations and "restrictions, to us, in our Privy Council.*"

Under this proclamation and the King's commission and instructions, civil government, in lieu of the military tribunals, was established in the Province of Quebec, on the 10th of August, 1764, The legislative power was wielded by the governor and council, and on the 20th September, 1764, an ordinance was passed by their authority to which it is proper to advert at length, as the very existence of this act of legis-

lation, as well as of many others, by the same authority, is hardly known at this time, no collection of them having ever been made by authority, and the old printed copies being very rare. The ordinance commences as follows: " Whereas upon " the conquest of this country, Her Majesty's Commander in " Chief of the forces, in America, did order and direct justice " to be administered to the inhabitants thereof, by courts " established for that purpose in the several governments into " which this Province was at the time divided, *of which His " Majesty, through one of his Secretaries of State, was pleased " to signify His Royal approbation, and to command the same " to subsist and continue until civil government could with " propriety be settled therein.* In order to satisfy any doubts " which might arise with regard to the decisions of the said " courts, and as far as may be to prevent all vexatious law, " suits, which might, at present or hereafter, arise therefrom " His Excellency the Governor (General Murray), by and with " the advice, consent and assistance of His Majesty's Council, " and in virtue of the power and authority to him given by " His Majesty's letters patent, under the Great Seal of Great " Britain, hath thought fit to order and declare that, from the " 8th day of September, in the year 1760, the date of the capi- " tulation of Montreal, until the 10th day of August last, from " which time civil government took place throughout this " province, all orders, judgments or decrees of the Military " Council of Quebec, and of all other courts of justice in the " said Government, or in those of Montreal and Three-Rivers, " do stand approved, ratified and confirmed, and shall have " their full force and effect, except in such cases where the " value in dispute exceded the sum of £300 sterling, when " either party may appeal to Her Majesty's governor and " council of the province, provided such appeal be lodged with " the clerk or deputy clerk of His Majesty's Council of Quebec, " within two months after the publication hereof."

" And it is hereby further ordained and declared, that the " judges, justices of the Peace and other magistrates, or civil " officers of this province, whom it doth or may concern, upon " application of the several parties, shall put in execution all " such orders, judgments or decrees of the said courts, the same " being properly attested as not having been already executed."

The judges, &c., mentioned here, are those who were appointed under another or prior ordinance, of the 17th September, 1764," For regulating and establishing the courts of " judicature, justices of the Peace, Quarter Sessions, Bailiffs " and other matters relative to the distribution of justice in " the province." This ordinance commences " Whereas it is " highly expedient and necessary, for the well governing of

" Her Majesty's good subjects of the Province of Quebec, and " for the speedy and impartial distribution of justice among " the same, that proper courts of judicature, with proper " powers and authorities, and under proper regulations, should " be established and appointed," " His Excellency the Governor, " by and with the advice, consent and assistance of His " Majesty's council, and by virtue of the powers and authority " to him given by His Majesty's letters patent, &c.," ordained and enacted " That the Superior Court of Judicature, or *Court* " *of Queen's Bench*, be established in this province, to sit and " hold terms in the Town of Quebec, twice in every year, viz, " one to begin on the 21st day of January, called *Hilary Term*, " and the other on the 21st day of June, called *Trinity Term*. " In this court His Majesty's chief justice presides, with power " and authority to hear and determine all criminal and civil " causes, *agreeable to the laws of England*, and to the ordi- " nances of this province, and from this court an appeal lies to " the governor and council, when the matter in contest is above " the value of £300 sterling, and from the governor and coun- " cil an appeal lies to the King and council when the matter " in contest is of the value of £500, sterling, or upwards..... " In all trials in this court, all His Majesty's subjects in this " colony to be admitted on juries without distinction, and His " Majesty's chief justice, once in every year, to hold a court of " Assize and general gaol delivery soon after Hilary Term, " at the towns of Montreal and Three-Rivers, for the more " easy and convenient distribution of justice to His Majesty's " subjects in those distant parts of the province."

" And whereas an Inferior Court of Judicature, or Court of " Common Pleas, is also thought necessary and convenient, it " is further ordained and declared by the authority aforesaid, " that an Inferior Court of Judicature, or Court of Common " Pleas, is hereby established, with power and authority to " determine all questions of property above the value of ten " pounds, with liberty of appeal either to the Superior Court, " or Court King's Bench, when the matter in contest is of the " value of £20 and upwards. *All trials in this court to be by ju-* " *ries, if demanded by either party, and this court to sit and* " *hold two terms in every year, &c. The judges in this court are* " *to determine agreeable to equity, having regard nevertheless* " *to the laws of England, as far as circumstances, and the* " *present situation of things will admit, until such time as* " *proper ordinances for the information of the people can be* " *established, by the governor and council, agreeable to the laws* " *of England. The French laws and customs to be allowed and* " *admitted in all causes, in this court, between the natives of* " *this province, where the cause of action arose before the first*

" *day of October, 1764. The first process of the court to be an* " *attachment against the body. An execution to go against the* " *body, lands or goods of the Defendant. Canadian Advocates,* " *Proctors, &c., may practise in this court.*"

All civil causes below the jurisdiction of the Common Pleas were made triable by justices of the Peace. An officer called the *Provost-Marshal* was appointed to act as sheriff in the execution of process, and until the arrival from England of a person to fill this office, provision was made by the appointment of bailiffs.

The commission appointing William Gregory, the first Chief Justice of the province, is dated the 24th August, 1764, and it directs him "to inquire by the oaths of honest and lawful " men of the province aforesaid, and by other lawful ways, " methods and means by which you can or may the better, " know, as well within their liberties as without, of all civil " pleas, actions and suits, as well real and personal, as mixed, " between us and any of our subjects, or between party and " party by whomsoever had, brought, sued or commenced, and " of all other articles and circumstances, the premises or any " of them in any wise, and the said pleas, actions and suits, " and every of them to hear and determine, and the same do " and fulfil in form aforesaid, doing therein that which to " justice doth belong and appertain, *according to the law and* " *custom of that part of our Kingdom of Great Britain cal-* " *led England, and the laws, ordinances, rules and regula-* " *tions of our said Province of Quebec, hereafter in that behalf* " *to be ordained and made.*"

The commission appointing William Hey, the second Chief Justice, is dated the 25th September 1766, and is in the same terms.

An Ordinance "for registering grants, conveyances, and other instruments in writing, of or concerning any lands, tenements or hereditaments within this province" passed the 6th November, 1764, recites the instructions of His Most Sacred Majesty to the governor bearing date at St. James the 7th December, 1763, in relation to the registration of grants and deeds, and enacts, among other things, "that the " due execution of every deed or conveyance, of what nature " soever, which shall hereafter be made of or concerning any " lands, tenements or hereditaments, within this province, " shall be proved before the said registrar or deputy regis- " trar, or other person qualified for that purpose, either by " personal acknowledgment of the grantor, vendor or mort- " gagor in such deed or conveyance respectively named, or " by the oath of one or more of the subscribing witnesses to " the same, which acknowledgment, or proof of the due execu-

" tion of such deed or conveyance, shall be endorsed on the " back thereof, and signed by the registrar or his deputy, " or other person thereto authorized as aforesaid, which " endorsement shall be allowed as evidence of the due execu- " tion of any deed or conveyance in any of His Majesty's " Courts of Record in this province,and every deed or convey- " ance, of or concerning any lands, tenements or hereditaments, " in this province, shall, within the space of forty days next " after the respective dates thereof be registered in the said " office in words at length, and for want of such registry " every such deed or conveyance shall be adjudged fraudu- " lent against any subsequent purchaser for a valuable " consideration."

Another ordinance was passed the same day, 6th November, 1764, by which it was ordained and declared, that until the 10th day of August next ensuing, that is the year of our Lord, 1765, the tenure of the lands in respect of such grants as were *prior to the cession of the province*, by the definitive treaty of peace signed at Paris on the 10th February, 1763, and the *rights of inheritance as practised before that period, on such lands, or effects of any nature whatsoever*, according to the custom of the country, *should remain* to all intents and purposes the same, unless they should be altered by some declared and positive laws.

The statement made by Baron Maseres, respecting these ordinances and the courts established by them, is verified by the judicial records of the country, in the Court of Appeals before the governor and council, as in the other courts. " These courts sat and acted for ten years together agreeably to the said ordinances; and all sorts of contracts were made in the province, upon the supposition that these laws were in force in it and were likely to continue so." (1)

It is true doubts have here been entertained, in very high quarters, as to the effect of the proclamation of 1763, in introducing the laws of England into the colonies ceded by the Treaty of Paris. (2) The legality of the Ordinances referred to has been also questioned, but it has been determined, with respect to Gibraltar, (3) that by the charter of the 13th year of the reign of George II, by which a new Court of Judicature was erected, authorized to hold pleas of what nature and kind soever, between the inhabitants, and to award and issue out warrants of execution for putting the

(1) Additional papers concerning the Province of Quebec, London, 1775.

(2) Burge, *Colonial laws*, preliminary treatise XXXV.

(3) 3 Knapp's Rep., 150 *Jephson* vs. *Riera*.

complainant into possession of the houses, lands, tenements or other things which should be specially adjudged to them, the laws of England as far as they were applicable to the situation of Gibraltar, were made the law of that place in all cases of property. whether real or personal. The charter to Gibraltar declares the royal will, "That the laws of England be the measure of justice, to be administered between the parties *as near as may be.*" The phrase, "*as near as may be*" literally the same which is used in the proclamation of 1763, and is similar to "as far as circumstances and the present situation of things" as used in our Canadian Ordinance. The authority of the case of *Campbell* vs. *Hall*, (1) as to the King's prerogative power to make laws for a ceded country, seems now to be fully acquiesced in and to have triumphed over the objections of Maseres, to be found appended to Howell's State Trials, vol. 20, pp. 325-355. The practice and usage, in some of the old colonies, on this continent, also, are in accordance with this doctrine. The introduction of the laws of England in civil cases, into Canada, is a matter of fact that cannot be denied, and it is certain that the old law of Canada was only restored, and reintroduced by the statute of the 14th Geo. III, ch. LXXXVII. This statute now comes to be construed, for, on the true reading of it depends the decision of this case. The preamble sets out with a recital of the proclamation of 1763. The 4th section declares that its provisions "in respect to the civil government of the said Province "of Quebec, and the powers and authorities given to the "governor, and other civil officers of the said province, *by* "*the grants and commissions issued in consequence thereof,* "*(the proclamation) have been found upon experience, to be* "*inapplicable to the state and circumstances of the said pro-* "*vince,* the inhabitants whereof amounted at the conquest to "above 65,000 persons, *professing the religion of the Church* "*of Rome, and enjoying an established form of constitution* "*and system of laws by which* their persons and property had "been protected, governed and ordered for a long series of "years, from the first establishment of the said Province of "Canada." It then proceeds to enact "That the said proclama- "tion, so far as the same relates to the said Province of "Quebec, and the *commission under the authority whereof* "*the government of the said province is at present adminis-* "*tered, and all and every the Ordinance and Ordinances* "*made by the governor and council of Quebec,* for the time "being, relative *to the civil Government and administration* "*of justice in the said province, and all commissions to jud-*

(1) 1 Cowper, 209.

" *ges and other officers thereof, be, and the same are hereby* " *revoked, annulled and made void,* from and after the 1st " *day of May,* 1775." This section in thus revoking the proclamation, the governor's commission, and particularly the ordinances relative *to the administration of justice, and all commissions to Judges* prospectively and from a day to arrive, viz : the 1st May, 1775, impliedly and necessarily countains a recognition, by the Parliament of Great Britain, of the authority of these ordinances and commissions, and gives them a legislative sanction. And this sanction, if otherwise it were required,must certainly remove all doubts as to the legality of the powers exercised *de facto* in the colony, previously to the 1st May, 1775. The 8th section enacts " that all His Majesty's " *Canadian subjects,* within the Province of Quebec, the reli- " gious orders and communities only excepted, *may* hold and " enjoy their property and possession, together with all cus- " toms and usages relative thereto, and all other their civil " rights, in as large, ample and beneficial manner, as if the " said *proclamation, commissions, ordinances and other acts* " *and instruments, had not been made, and as may consist* " *with their allegiance to His Majesty, and subjection to the* " *Crown and Parliament of Great Britain.* And that in all " matters of controversy, relative to property and civil rights, " resort shall be had to the laws of Canada as the rule for the " decision of the same, and all causes that shall hereafter be " instituted in any of the Courts of Justice to be appointed " within and for the said province by His Majesty, shall, with " respect to such *property and rights,* be determined agreeably " to the said laws and customs of Canada, until they shall be " varied or altered, &c." The terms, *His Majesty's Canadian subjects* when taken with the context, imply the new or French Canadian subjects, in contradistinction to the old subjects to whom the proclamation of 1763 was more particularly applicable. The section is conceived in the future, it refers to the courts thereafter *to be appointed,* not to the existing courts, which, until the 1st May, 1775, were to continue to administer the law of England, " as near as may be" according to their constitution. Now follows the proviso which is all important. Section 9. " Provided always, that nothing in this act contained *shall extend or be construed to* extend, to any lands that have been granted by His Majesty, &c., to be holden in free and common soccage ; " by section 10, containing another proviso as to the power to devise or bequeath by last will and testament, " such will being executed either according to the laws of Canada or according to the forms prescribed by the laws of England" The 11th section after reciting " whereas the certainty and lenity of the criminal law of England, and

the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants *from an experience of more than nine years during which it has been uniformly administered,*" enacts, "*that the same* shall *continue* to be administered and shall be observed as law in the Province of Quebec, *to the exclusion of every other* rule *of criminal law*, or mode of proceeding thereon, which did or might prevail in the said Province, *before the year of our Lord* 1764." The wise policy which dictated the restoration of the old laws of Canada, in 1774, as better adapted to the wants of the colony than the system in practice, since the year 1764, equally required that the grants of land in free and common soccage made by the crown under the proclamation of 1763, to the companions in arms of Wolfe, and to the old colonists of Great Britain, should be respected, and that the law of England should continue unimpaired to be the governing law as to them. While justice required that the old law of real property should subsist as the general rule, the honor of the crown and the faith of the state, were pledged to maintain the grants made in "*free and common soccage according to the laws of England*, the new subjects, the French Canadians, in obtaining such a boon as was conferred by the Quebec Act, never could expect that limits should be put upon the power of the Sovereign to to make grants of lands, whatever his *jus conorœ*, and which it was as competent for him to dispose of under an English tenure, as it was to his predecessor to do the same by a French one. None could object to a grant in soccage by the King of Great Britain, with its incidents, more than to a grant in *fief* or in *franc alleu*, whether according to the *Coutume de Paris* or that of *Vexin le Français* or any other, by the King of France, with their incidents. Indeed history has shewn that the people of Canada, content with the provisions of the Quebec Act of 1774, clung to their allegiance to the Crown of Great Britain, at the very time, when her old colonists repudiated it.

The British Act of 1791, the 31st Geo. III, cap. XXXI, which divided the Province of Quebec, into Upper and Lower Canada, next deserves to be mentioned. The 43 section enacts: " that all lands which shall hereafter be granted within the said Province of Upper Canada, shall be granted in free and common soccage, in like manner as lands are now holden in free and common soccage in that part of Great Britain called England, and *that in every case where lands shall be hereafter granted within the said Province of Lower Canada, and where the grantee thereof shall desire the same to be granted in free and common soccage, the same shall be so granted, but subject nevertheless to such alterations with respect to the na-*

ture and consequences of such tenure of free and common soccage, as may be established by any law or laws, which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of the Province." The desire of the grantee is here recognised by Parliament as a rule for making the grant in soccage, and it had already been practically adopted by the government in Canada; for though several grants by the crown of Great Britain have been made of lands to be held *en fief*, and under French tenures, such grants are the exeeption, and the grants in soccage have been the rule since the conquest. The *alterations* mentioned in this section no doubt referred more particularly to the laws of descent; the *nature and consequences of soccage tenure* being the right of primogeniture, which, in Lower Canada, would contrast with the equal distribution, among the children, of land *en roture*, and would suggest the probability of future alterations. The next and last British Statute to be examined on this head is the Canada Tenures Act, 6th Geo. IV, cap. LIX, by the 8th section of which it is declared in express terms: "*Whereas doubts have arisen, whether lands granted in the said Province of Lower Canada by His Majesty, or by any of His Royal predecessors, to be holden in free and common soccage, shall be held by the owners thereof, or will subsequently pass to other persons according to the rules of alienation and descent in force in England, or according to such rules as were established by the ancient laws of the said Province, for the descent and alienation of lands therein;*" *it is therefore enacted*, "that all lands within the Province of Lower Canada, which have heretofore been granted by His Majesty, &c., to be holden in free and common soccage, or which shall or may, hereafter be so granted, &c., may and shall be &c., *held, granted, bargained, sold, alienated, conveyed and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the law of England established and in force in reference to the grant, &c., descent, &c., or to the dower or other rights of married women;*" this act leaves not a shadow of doubt as to the operation of the law of England, upon the grants in soccage in Canada. I view it as purely declaratory of what the law always was, in which light it has also been here considered by the Legislature of Lower Canda, in the provincial statute of the 9th Geo. IV, cap. LXXVII, to the consideration of which I now pass.

The Canadian Legislature recites among other things in the preamble to this act: "Whereas divers inhabitants of this province, and others, are now vested and possessed of sundry lands, and other immoveable property, in free and common soccage, situate within the Province of Lower Canada, and hold

the same by and in virtue of *grants, bargains, sales, enfeoffments, &c.*, differing *both in manner and form from such rules as are by the law of England established in reference to such grants, &c.*, and whereas it is necessary and expedient to make provision for quieting the lawful proprietors of such lands, and *confirming to them the legal possession and enjoyment of the same* notwithstanding that such grants, &c., or other conveyances, *do or may differ from such rules* and restrictions as are by the law of England established in reference to the same respectively." The first section enacts "that all such grants, bargains, &c., by or in virtue of which any person or persons whomsoever are or shall be the proprietor or possessor of, or lay claim to be the proprietor and possessor of any lands or other immoveable property, heretofore granted in free and common soccage within the Province of Lower Canada, and which may have been made and executed prior to the passing of this act, &c., though not made and executed according to the rules and restrictions established by the law of England in reference to such grants, &c., *shall be and are hereby declared to be as good and valid in law, to all intents and purposes whatsoever, as if they and each and every of them had been made and executed in conformity to such rules and restrictions as aforesaid*, provided always, that such grants, &c., were at the time of making and executing the same, good and sufficient to operate as such grants, &c., *under any law or usage in force in this province, at the time of making or executing the same*, and that as fully and amply to all intents and purposes *as if the said rules and restrictions of the law of England had never been in force.*" The force of this act has been felt by Respondent, and an attempt has been made to get rid of it altogether. I confess that I am startled at this attempt to expunge from the statute book a law which took its place there, and stood upon it unimpeached as long as the Legislature of Lower Canada itself had an existence, and which has survived that Legislature. This statute was brought prominently under the notice of the old Court of King's Bench for Quebec, in the case of *Hunt* and *Tait*, and afterwards in the Provincial Court of Appeals, and neither at the bar nor from the bench, in either of these courts, was its validity ever questioned. Though the royal assent to it was not signified within the space of two years, as required by the constitutional act of the 31st Geo. III, cap. XXXI, sect. 33, it was proclaimed as law in the Province by royal authority, under a special act of the Imperial Parliament to that effect, equally binding and conclusive in this respect as the constitutional act itself. The proclamation was made in Quebec, on the 1st September, 1831, but before this, viz : on the 17th November, 1830, the decision was pro-

nounced in the case of Paterson *et al.*, and McCallum *et al.*, in the Provincial Court of Appeals, in which the law of England was distinctly recognized as the rule to govern lands in soccage. It must be observed also, that our Canadian statute, even though it were assailable as to the time and manner of receiving the royal assent, would yet import a deliberate recognition, by our local legislature, of the existence of this self same English rule, and would be entitled to the greatest weight in the construction of the Quebec Act of 1774. But there is now to be mentioned another law of Lower Canada, as to which there can be no doubts, and it is the last, viz : the registry ordinance of the 4th Victoria, cap. XXX. The 34th section of this act of legislation declares in express terms, that " *the alienation of the real estate of married women, held in free and common soccage, and those held under other and different tenures in this province, is governed by different rules.* " Having thus passed in review the legislative provisions upon the subject, it may be asked whether apart from them, the soccage tenure has not its incidents or " *nature and consequences* " which are characteristic and distinctive, of which it cannot be stripped and without which it cannot exist at all. It is useless to refer to the law of France for an explanation of this Saxon Tenure, for it is unknown to that law either by name or in effect. It is to the law of England alone that we must look for information, from the very necessity of the case. But in the construction of all feudal grants of land, there is moreover a well recognized doctrine : " *La teneur de l'investiture est la première loi ;* à son défaut, c'est la coutume locale ; à défaut de celle-ci, la disposition expresse du droit commun des fiefs ; la disposition expresse manquant, c'est l'esprit et le sens des coutumes féodales qui doivent servir de règle, *et ce n'est que subsidiairement à tout cela qu'on a recours au droit écrit.*"(1) This subject is well treated in Laboulaye, (2) He asks :

" Qu'est-ce que le fief ? " and answers : " Ce nom de fief comprit des tenures d'origine et de natures fort diverses, et cette diversité *décida seule du droit de succession.* Le manoir seigneurial, avec tous les droits y attachés s'est nommé fief. Ce manoir était un ancien alleu, ou un bénéfice devenu héréditaire et indépendant. Pour ces concessions seigneuriales il n'y a plus de règle fixe de succession, c'est le contrat qui fait la loi, c'est la volonté du Seigneur qui décide. *Voluntas donatoris in chartâ doni manifestè expressa servetur,* dit le deuxième statut de Westminster. Au baron de décider s'il y aura succession, et quel sera l'ordre de cette succession. *Encore une fois,*

(1) Merlin, *Répertoire*, vbo *fief*, sect. 2, § 4, No. 3.

(2) Traité de la condition des femmes, p. 208 et seq.

c'est la volonté du Seigneur qui fait la coutume de la terre, et il y a à cet égard un tel arbitraire, que Beaumanoir ne craignait pas d'avancer, " *Que les coutumes sont si diverses que l'on ne trouverait pas au royaume de France deux Chastelleries qui, de tout cas, usassent d'une même coutume.* "

In the preface to Bishop Gibson's Reliquiæ Spelmanniance. The editor referring to the *great case of defective titles in Ireland,* says : that it led to a more general inquiry, " What the reservation of a tenure is to the grant ? Whether it be a part of the grant and the *modus concessionis,* or whether it be a distinct thing *et aliud* from the grant." In whatever way this may be answered, Sir Henry Spelman himself, p. 19, gives instances of charters granted by Saxon Kings of lands, upon different conditions, dependent upon the will of the Sovereign, and shewing that this *voluntas donatoris,* freedom of will, might be communicated to the grantee in the disposal of the land after his death, *post obitum suum cuicumque voluerit hæredi relinquat,* and that he was left to frame his own rule of succession.

In Hale's history of the Common law, p. 252, the course of descents in England is traced up to the feudal grants of land.

Dalrymple's history of feudal property, cap. v, p. 197, again traces the rules of descent or succession to the feudal grants, as well as the alienation of property, p. 90. The very definition of soccage land, as given in Woodeson's lectures, vol. 2, s. 23, is " soccage or as we now term it, freehold land is such *as is pleadable at the common law,* that is, *recoverable in the King's Superior Courts.* (1)

The rules as to alienation, descent and devise of soccage lands are inseparable from the tenure, and can only be those of the law of England. No hardship was imposed by the crown in *making* these grants originally by the soccage tenure, the acceptance of the land was voluntary, and the condition was made known to each succeeding purchaser from the grantee, and must have been tacitly adopted by him. Just as lands *en fief* are descendible, by one rule, and those *en roture* by another, the free and common soccage tenure carried with it its own rule of descent and alienation.

Being of opinion then, that the law of England is the governing law in relation to soccage land in Lower Canada in what respects descent, alienation and dower, it is next to be ascertained if Appellants have made out a right to the land in question, so as to entitle them to the judgment they claim under the deed of sale of the 15th October, 1804, before Chaboillez, and his colleague notaries, *at Montreal,* by John Robertson,

(1) Termes de la Ley. Soccage : 1 Preston on Estates, 200, 210.

acting through the ministry of his attorney Katherine Christie to Patrick Robertson and Francis DesRivières.

As to the form of this instrument, under the rule *in omnibus quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis, ubi fit negotiatio,* it cannot be questioned here, for it bears upon its front all the essentials of a valid deed of sale or conveyance in Lower Canada. It has been said that there has been no livery of seisin, but the taking of *esplees* is established to my satisfaction by the sale of the staves, and, moreqver, I approve of the doctrine laid down by the court, in the case cited at the bar from the 1st Louisiana Condensed Reports, 321. The objection arising from non registration, under the Act 10 and 11 George IV, cap. VIII, I conceive, cannot apply to a case like this, because the Respondent derives his title, not from the same grantor, John Robertson, but from another, viz, Katherine Christie.

Now, so far from any right being shewn in her, she was the very person who acted as the attorney of John Robertson in conveying the land to Appellants, and is stopped thereby from setting up any title in herself, even if she had one. Again I hold that it is established that Respondent, before he purchased, had full notice of Appellants' title, and that *malâ fide* has been brought home to him, he therefore cannot avail himself of the plea of non-registration. In conclusion, under the first count of Appellants' declaration, I am of opinion that they are entitled to judgment against Respondent, and I agree in the condemnation which the court is about to render, as it is the usual form in our court. For though the right is dependent upon the law of England, the remedy must be enforced according to the course and practice of the tribunals of Lower Canada. *In his quæ respiciunt litis ordinationem attenditur consuetudo loci ubi causa agitur.* On the subject of prescription, I shall say nothing, as it does not at all enter into my view of the case, but I cannot, in connection with the question of registration, omit to notice the terms of the law of England, *enfeoffement, bargain and sale, and mortgage,* as applied by the Legislature of Lower Canada, to immoveable property held in free and common soccage, in the statute of the 10th and 11th Geo. IV, relied upon by Respondent. The use of these terms is an additional proof of the recognition of the law of England, as furnishing the rule of decision.

MONDELET, Justice: A succinct review of some of the various phases of the legislative history of Canada, precludes, in my mind, the necessity of inquiring into the effects of a change of domination on our system of laws, as, without adverting to any principles of public or international law, it will be found that the rule of decision, in the present case, is written in se-

veral acts of positive enactment, as well of the Imperial as of the local Legislatures. A few general principles being settled, this, like every case, must, after all, depend upon its own particular circumstances. It is, therefore, a pure act of supererogation to acknowledge that the Canadians were fully entitled to the preservation of their property, and that their laws and usages remained intact, until abrogated by competent authority; the ancient state of the law, whatever it was, continued, and of that state, of the changes, if any, it has undergone, the acts of the Legislature, and of the Government, ought to be authentic and decisive evidence: whilst, on the other hand, it is plain that inducements were held out to the old subjects, which, being followed by and embodied in acts of Legislation, were acts of national faith, binding upon the honor of the British nation. As acts of national law, it was equally essential that the power of the Supreme Legislature of the Empire should be adequate to their construction and inforcement. We are met at the outset by the proclamation of 1763, which was the first act of the British Sovereign that followed the capitulation of Montreal. This, it is obvious, could not have, and has not had, any legal effect for establishing any particular system of laws, in it, the King is made to say: "We have given power, under our great seal, to the governor of our said colonies, respectively, to erect and constitute, with the advice of our said Councils, respectively, Courts of Judicature and public justice within our said colonies, for the hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as may be, agreeable to the laws of England," &c., &c. From the period at which Canada became a British Province, up to the Quebec Act, justice would appear to have been administered according to both the English and French laws indifferently, on the authority of ordonnances enacted by General Murray, and others having the administration of the Government during this interval of time. This is abundantly proved by the judicial records of those times.

The Act of 1774 comes next in order, and, in the 4th section, it is enacted "that the said proclamation (of 1763) so far as "the same related to the said Province of Quebec, and the "commission under the authority whereof the government of "the said province is at present administered, and all and every "the ordinance and ordinances, made by the governor and "council of Quebec, for the time being, relative *to the civil* "*government and administration of justice* in the said "province, and all commissions to judges and other officers "thereof, be and the same are hereby *revoked, annulled, and* "*made void, from and after the first day of May, 1775.*" In this, we find a recognition of the power under which the

governor and council of the Province of Quebec, passed ordinances and established courts of justice, clearly evidenced by the terms *revoked, annulled and made void,* and by the limitation of the time at which these ordinances should cease to have force. It becomes necessary, therefore, to enquire into the nature of these ordinances, and, by a reference to a collection of them published at Quebec in 1767, by Brown and Gibsone, by authority (it is presumed), we find an ordinance passed in council, at Quebec, the 17th September, 1764, signed Ja. Murray, p. 6, constituting courts of justice and ordaining among other things,that, in the Court of Common Pleas, having jurisdiction in civil matters. " The judges in this court, are to " determine according to equity, having regard, nevertheless, " to the laws of England, as far as the circumstances and " present situation of things will admit, until such time as " proper ordinances for the information of the people, can be " established by the governor and council, agreeable to the " laws of England. The French laws and customs to be allowed " and admitted in all causes in this court, between the natives " of this province, when the cause of action arose before the " first day of October, 1764."

By the two last foregoing extracts, two points are established: 1st the introduction and administration, in part, of the laws of England; 2nd the sanction by the British parliament of the authority under which they were introduced.

Reverting to the Quebec Act (1774), the 8th section provides that, " in all matters of controversy, relative to property and " civil rights, resort shall be had to the law of Canada, as " the rule for the decision of the same; and all causes that " shall hereafter be instituted in any of the courts of justice " to be appointed within and for the said province, by His " Majesty, his heirs and successors, shall, with respect to such " property and rights, be determined agreeably to the said " laws and customs of Canada, until they shall be varied or " altered by any ordinance that shall, from time to time, be " passed in the said province, by the governor, lieutenant " governor or commander in chief for the time being, by and " with the advice of the Legislative Council of the same, to be " appointed in manner hereinafter mentioned." This section is followed by a proviso contained in the 9th section, in the words following: " Provided always that nothing in this act " contained, shall extend, or be construed to extend, to any " lands that have been granted by His Majesty, or shall " bereafter be granted by His Majesty, his heirs and successors, " to be holden in free and common soccage," and, of this, it is sufficient to say that, taking this proviso according to a well known rule of construction, in reference to *subjectam materiam,*

it must be restricted to what immediately precedes in the section which it qualifies.

By the Imperial Act, 31 Geo. III. ch. XXXI, sect. 43, it is provided " that, in every case where lands shall be hereafter " granted, within the said Province of Lower Canada, and " where the grantee thereof shall desire the same to be gran- " ted in free and common soccage, the same shall be so gran- " ted but subject nevertheless to such alterations, with respect " to the *nature and consequences* of such tenure of free and " common soccage, as may be established by any law or laws " which may be made by His Majesty, his heirs or successors, " by and with the advice and consent of the Legislative Coun- " cil and Assembly of the Province." If this provision mean any thing, its plain legal import must be taken to be that, not only the tenure of free and common soccage, but also, that all its legal consequences are introduced, whenever any lands are granted, according to that tenure.

The 6th Geo. IV, ch. LIX contains the following enactment in the 8th section " And whereas doubts have arisen whether " lands granted in the said Province of Lower Canada, by his " Majesty, or by any of his royal predecessors, to be holden " in free and common soccage, shall be held by the owners " thereof, or will subsequently pass to other persons according " to the rules of decent and alienation in force in England, or " according to such rules as were established by the ancient " laws of the said Province, for the descent and alienation of " land situate therein : Be it therefore declared and enacted, " that all lands within the said Province of Lower Canada, " which have heretofore been granted by his Majesty, or by " any of this Royal predecessors, to any person or persons, " their heirs and assigns, to be holden in free and common " soccage, or which shall or may hereafter be so granted by " His Majesty, his heirs and successors, to any person or per- " sons, their heirs and assigns, to be holden in free and com- " mon soccage, may and shall be by such grantees, their heirs " and assigns, held, granted, bargained, sold, aliened, conveyed " and disposed of, and may and shall pass by descent in such " manner and form, and upon and under such rules and res- " trictions, as are by the law of England established and in " force, in reference to the grant, bargain, sale, alienation, " conveyance, disposal and descent of lands holden by the like " tenure, therein situate, or to the dower or other rights of " married women in such lands, and not otherwise, any law, " custom or usage to the contrary in any wise notwithstan- " ding : Provided nevertheless, that nothing herein contained " shall extend to prevent His Majesty, with the advice and " consent of the Legislative Council and Assembly of the Pro-

" vince of Lower Canada, from making and enacting any such " laws and statutes as may be necessary for the better adap- " ting the before mentioned rules of the laws of England, or " any of them to the local circumstances and condition of the " said Province of Lower of Canada, and the inhabitants there- " of." On the character of this statute, some diversity of opinion exists, whether it be a declaratory law, or whether it provide for the future only. Of the fact of doubts having arisen in relation to the mode in which lands in free and common soccage were to be held, it contains authentic and decisive evidence. This assertion by competent authority is no more gainsaid than its power can be denied, of finally settling the law on this matter: for what it has done, has been effected by virtue of that sovereign power of Parliament, called omnipotent, which it were futile to question. It presents itself with two unmistakeable characters of a declaratory statute: the *enunciation* of doubts on the construction of previous laws, and the use of particular words indispensable in the phraseology belonging to that class of statutes, and to that class only. The reason for including them is obvious, and, if the fact of doubts existing be not susceptible of dispute, their use is entirely conclusive.

The next and the last act of legislation having relation to this subject, is the Provincial Statute, 9th and 10th Geo. IV, chap. LXXVII. In it are recited, as well the 8th section of the above recited Imperial Statute of the 6th Geo. IV, chap. LIX, as its proviso, the authority of the Provincial Legislature for making the provisions in the present act contained, and also the clause of the Imperial Act, 31st Geo. III, above recited, and it then proceeds, among other enactments, as follows: "Whereas " should proprietors of land granted in free and common soc- " cage be deprived of the protection of the laws of this pro- " vince, and of the advantages resulting from the customs re- " ceived and established with regard to real property, they " would be exposed to the loss or diminution of the rights they " have acquired, and up to this day have exercised and enjoyed, " as attached to such lands or real properties, or to the posses- " sion of such lands, so granted in free and common soccage. " And whereas divers inhabitants of this province, and others, " are now seized and possessed of sundry lands, and other im- " moveable property, in free and common soccage, situate " within the Province of Lower Canada, and hold the same by " and in virtue of grants, bargains, sales, enfeoffments, aliena- " tions, gifts, exchanges, disposals, descents, devises, inheritance, " right of dower, or other conveyances, differing, both in man- " ner and form, from such rules and restrictions as are by the " law of England establised in reference to such grants, bar-

" gains, sales, enfeoffments, alienations, gifts, exchanges, disposals, descents, devises, inheritance, right of dower and other " conveyances : And whereas it is necessary and expedient to " make provisions for quieting the lawful proprietors of such " lands, and confirming to them the lawful possession and enjoyment of the same, notwithstanding that such grants, bargains, sales, enfeoffments, alienations, gifts, exchanges, disposals, descents, divises, inheritance, right of dower or other " conveyances, do or may differ from such rules and restrictions as are by the law of England, established in reference " to the same, respectively : And whereas it is also necessary " and expedient to enact and declare in what manner such " lands as are now holden, or shall or may hereafter be held " in free and common soccage, within the limits of the Province of Lower Canada, shall and may hereafter be held, " acquired, conveyed or transferred : Be it therefore enacted " by the King's Most Excellent Majesty, &c., and it is hereby " enacted, &c., that all such grants, bargains, sales, enfeoffments, " alienations, gifts, exchanges, disposals, descents, devises, inheritance, right of dower, or other alienation or conveyance, " whatsoever, by or in virtue of which any person or persons " whomsoever, are or shall be the proprietor or possessor of or " lay claim to be the proprietor or possessor of any lands, or " other immoveable property, heretofore granted in free and " common soccage within the Province of Lower Canada, and " which may have been made and executed prior to the passing " of this act, for the transfer, alienation and conveyance of any " such lands or other immoveable property, though not made " and executed according to the rules and restrictions established by the law of England, in reference to such grants, " bargains, sales, enfeoffments, alienations, gifts, exchanges, " disposals, descents, devises, inheritance, right of dower or " other conveyances, shall be, and they are hereby declared to " be, as good and valid in law, to all intents and purposes " whatsoever, as if they, and each and every of them, had been " made and executed in conformity to such rules and restrictions as aforesaid : provided always, that such grants, &c,. &c., " and each and every of them respectively, were, at the time " of making and executing the same, good and sufficient to " operate as such grants, &c., &c., under any law or usage in " this province, at the time of making and executing the same, " and that as fully and amply, to all intents and purposes, as " if the said rules and restrictions of the law of England, had " never been in force, or had *not been so declared* to govern " and affect the transfer, alienation and conveyance of lands or " other immoveable property, so held in free and common soc-

" cage, any law, usage or custom to the contrary notwithstan-
" ding. "

The 3rd, 4th and 5th clauses protect the rights of *bailleurs de fonds*, and privileged and hypothecary creditors.

A proviso is contained in the 6th clause to the following effect: " Provided always, and be it further enacted, &c., that " when any proprietor of land, granted or held in free and " common soccage in this Province, shall have died before the " passing of this Act without having partitioned the same, " either by last will and testament, or otherwise, the heirs of " such proprietor shall be held to partition such lands accord- " ing to the old laws of this country, unless the said heirs " should have agreed among themselves upon a different " partition."

The Provincial Statute presented for the royal sanction, and reserved 14th March, 1829, was sanctioned by His late Majesty, William the Fourth, in council, 11th May, 1831. The royal assent was signified by the proclamation of His Excellency, the then governor in chief of Lower Canada, 1st September, 1831.

According to the Imperial Act, 31st Geo. III, ch. XXXI, § 32, His Majesty's assent to the Provincial Statute hereinbefore in part recited, ought to have been signified within the space of two years, from the day on which such bill had been presented for His Majesty's assent by the governor, lieutenant governor, or person administering the Government of this Province; but it is under a different authority, that the bill in question has been assented to and has now the force of law. The Imperial Act, 1 Will. IV, ch. II, contains a provision whereby it is declared to be " lawful to His Majesty, his heirs and successors, to sanction, or to authorize his or their sanction to be given to any bill or bills, which had heretofore or which might be hereafter, passed by the Legislative Council and Assembly to regulate the descent, grant, bargain, sale, alienation, conveyance or disposal of any lands which are now, or may hereafter be, holden in free and common soccage in the said Province of Lower Canada, or to regulate the dower or other rights of married women, on such lands; notwithstanding any inconsistency, or contradiction, or supposed inconsistency, to or with the laws of England, or with any of the provisions *in the Acts of Parliament above mentioned, or in any of them contained, to the contrary.*" Under the authority conferred on His late Majesty by the last mentioned statute, the royal assent could have been legally and was in fact given to the Provincial Act, 9th and 10th Geo. IV, ch. LXXVII, on the 11th May, 1831, and the proclamation of the governor in chief, of the 1st. September, 1831,

whereby this assent is signified, expressly recites the Imperial Act of the 1st Will. IV, ch. XX, as the authority in virtue whereof this sanction has been given.

Assuming this as the state of the law, Appellants have a good title in the deed of sale of 1804, by John Robertson, to Patrick Robertson and Francis DesRivières; they may also invoke successfully the rules of descent established by the old laws of the country, and this according to the provisions of the Provincial Statute 9th and 10th Geo. IV, ch. LXXVII. This act is not only important in the provisions which it contains, but also as supplying evidence of the opinion entertained by the Legislature of the undoubted declaratory character of the Act 6th Geo. IV, ch. LIX.

Looking at Appellants' declaration, it would appear that, in view of the provisions contained in the 6th clause of the last mentioned Provincial Statute, the first count, which is predicated on a title or possession by joint-tenancy, could not be sustained; but the second count, if supported by sufficient evidence, alleges all that is necessary in an action like the present one. The sufficiency of the title by John Robertson to Patrick Robertson and Francis DesRivières, as tutor to the minor children of Alexander Robertson being established, it remains to examine whether or not it has been followed by tradition, in the first instance, and possession afterwards, in order to pass property and ownership to the vendees. But it must be premised that this is not a case under the law *quoties*, which if it ever has been the law of Customary France, (a point involved in considerable doubts by an *arrêt* cited in Grainville, and of which mention is made in the case of Bowen and Ayer), (1) can have no application to sales made by different vendees. John Robertson having disposed in his lifetime, through the instrumentality of Mrs. Robertson herself, of his interest in the property in question, there remained no part of it in his *communauté* with his wife (if such had existed), or in his succession at his deeease. The deed of sale from John Robertson to Patrick Robertson and Francis DesRivières, recites that a true copy of the letters patent and of the diagram of part of the said Township, were delivered at the time of executing the said deed of sale to the said Patrick Robertson. This according to Dumoulin, is that kind of symbolical delivery which is equivalent to a real tradition and transfers the property, " *Vel per traditionem instrumentorum acquisitiones fundi in quibus continetur jus competens venditori in illo fundo* " (1 C. de donationibus) quæ ità intelligi debet, non autem per traditionem instrumentorum

(1) 2 *R. J. R. Q.*, p. 164.

ipsius venditionis, ut tenent Guillemus Bartolus, Imola &c., &c. (1)

And it will be found by reference to Pothier's Contrat de Vente, No. 321, that the above *enunciation* in the deed of sale would furnish sufficient evidence in a case of feigned tradition (and symbolical tradition is but a species of feigned tradition) "*pourvu que la preuve de la tradition soit établie par un acte authentique,*" says Pothier, according to the maxim "*in antiquis enunciativa probant.*" The deed in question being more than 30 years old, the enunciation of the delivery of the patent and diagram contained in the deed of sale of 1804, by John Robertson to Patrick Robertson and Francis DesRivières, furnishes legal proof of this fact. The efficiency of symbolical delivery is emphatically laid down by Pothier: "La tradition du titre d'une chose est aussi une tradition "symbolique qui équipolle à la tradition réelle de la chose," (2) Toullier shews clearly what effect followed symbolical tradition in the following terms: "Pour éluder ces conséquences et d'autres moins injustes, on avait imaginé des traditions feintes ou simulées, des traditions symboliques qui rendaient fort rare l'application d'un principe, dont on reconnaissait l'injustice, sans l'abandonner;" (3) (the principle of the law *quoties.*)

Real tradition, which consists here in suffering that the purchaser go into possession, *si sciente venditore in possessione fuisti*, and possession, consequent thereon, at a time anterior to Respondent's possession, has been sufficiently and satisfactorily established to entitle Appellants to bring a petitory action. The taking of a title by Respondent in 1833, after having been in possession since 1825, is an acknowledgment that his previous possession was not one *titulo domini*; for in law, it was the possession of Appellants. He possessed for them and not for himself. It might have been better for him to have taken no title. The possession of every squatter who preceded Respondent in the occupation of these lands was a possession for Appellants. "Cæterùm animo nostro, "corpore etiam alieno possidemus, sicut diximus per *colonum* "et servum. Nec movere nos debet, quod quasdam res etiam ignorantes possidemus, (4) possession being kept by any one for us (*colonum*) is preserved by intention (*animo*). It is not

(1) Merlin, *Rep.*, vbo *Tradition.*

(2) Pothier, *Droit de domaine de propriété*, No. 201; Proudhon, *Domaine de Propriété*, No. 504; Troplong, *Vente*, No. 236.

(3) 4 Toullier, No. 57.

(4) ff. Lib. 61, Tit. 2, L. 3, § 12, *De acqir. vel amitt.* possess.

pretended that Respondent ever possessed by or through these men, nor is it argued that they possessed for themselves: the legal conclusion therefore is, that they possessed for the true owners, that is for Appellants. There is no such thing as a title to property vacant or in abeyance. Every thing that is capable of ownership should have a legal and determinate owner. Dinning's deposition is important only as containing evidence, from his own mouth, of the permission of the Appellants, under which he was enjoying possession, and with respect to the impeachment of his character, it affects only those parts of his deposition which are not corroborated by other witnesses. If however the necessity of tradition be not incontrovertibly ascertained, as there is every reason to believe that it was not, as will be seen hereafter, as respects the circumscription of the Prévosté et Vicomté de Paris, the title of Appellants constitutes alone a sufficient basis for his action, and he may rely on the definition given by Prevôt de la Jannès of the petitory action: " lorsqu'on revendique la possession " d'une chose uniquement parce qu'on la possédait, c'est l'action " possessoire, lorsqu'on redemande la possession de la chose, " parce qu'on avait droit de la posséder, quoiqu'on ne la possé- " dât pas effectivement, c'est l'action pétitoire." (1)

The last question is that of Respondent's title, for the sufficiency of which he has relied in the very able argument, made for him at the bar on a law of Rome, and on registration under the authority of our Provincial Statute, before Appellants had registered their own. In order to determine how far the law *quoties*, which has been cited has any application here, it is necessary to inquire if Respondent has acquired from the same proprietor as Appellants, for it is only in such a case that it will help him. If it be shewn that John Robertson, the husband of Catherine Christie, and the father of Catherine, Mary and Amelia Robertson, his children and heirs, had in the year 1804, disposed of the property in question to individuals now represented by Appellants, and this is not a question any longer; it follows that Respondent's title is derived from one who had ceased to be the proprietor, and that it does not proceed from the same source as that of Appellants. This is clearly the sense in which the law *quoties* has been interpreted, as may be seen in Pothier, *Propriété* n° 247, where he says: " Il suit de là, que si avant que la tradition n'ait été faite, *cette personne*, contre la foi de la convention, vend ou donne la chose à un autre, etc., etc. (2) also, in the *arrêt* of Grainville,

(1) 1 Prevot de la Jannès, 35.

(2) 4 Toullier, pp. 55, 56, no 57.

cited in Bowen and Ayer, (1) On the question itself whether the law *quoties* has been received in France, though there was much diversity of opinion, it would seem to be set at rest by the above *arrêt*, distinctly laying down, that the law *quoties* never was law in the Vicomté and Prévôté de Paris, an opinion not inconsistent with that of other writers who maintained that its authority had always been recognized, but without enlightening us as to the peculiar divisions of France, in which the provision of the Roman law was respected.

The registering of Respondent's title is impugned on the ground that unless it proceeded from the true owner, the registration could confer no right of ownership on Respondent, registration not having the effect of creating, but merely of confirming titles. That Respondent could have acquired no right of property under his title is clear on every principle applicable to this question. " Lorsque le vendeur a vendu et livré la chose sans le consentement du propriétaire, il est évident qu'il n'a pu transférer à l'acheteur un droit de propriété qu'il n'avait pas. " (2) Registration is a means of giving publicity to titles, for the purpose of securing safe dealing with owners of real property, in the same manner that a Sheriff's sale which has been preceeded by regular publications of sale is intended as notice to the world, and insures to the purchaser an indeafeasible title if it have been made *suprà domino*, yet neither a title by sheriff, if the seizure and sale have been effected against a party who is not the owner, nor the registry of a title obtained from a stranger, are effectual for acquiring an interest in it : " Du créancier au débiteur, et aux com-
" plices de la fraude, il n'y a pas et ne peut y avoir de diffé-
" rence entre un contrat de vente simulé et un contrat qui
" n'existe pas. Il n'y a donc nul doute qu'en ce cas, le créancier
" ne puisse poursuivre l'expropriation d'un bien qui n'a été
" vendu qu'en apparence, et dont le débiteur conserve encore
" la propriété réelle, sous le nom de son acquéreur supposé.
" *La transcription du contrat de vente n'y peut mettre d'obs-*
" *tacle, car elle est nulle comme le titre qui en est l'objet.*" (3) If mere registry conferred title, a door would be open to innumerable frauds : two persons in collusion could at any time oust the legitimate owner by concerting an imaginary title, and no possible vigilance or activity could protect acquired rights. Such was never the intention of the law. Hence is it

(1) Recueil d'arrêts de la quatrième Chambre des Enquêtes par de Grainville, p. 380.

(2) Pothier, *Vente*, n° 325 ; Propriété, 244.

(3) Merlin, *Quest. de Droit*, vbo *expropriation forcée*.

that we read in Merlin, (1) speaking of the law Brumaire an VII, the provisions whereof are analogous to those of our registry laws, " la transcription transmet à l'acquéreur les droits " *que le vendeur avait* à la propriété de l'immeuble." Where, therefore, the vendor had no rights, the transcription or registration conferred none. In the former part of the article, p. 423, there is cited the *arrêt* of Charpentier and Siquot, quoted in the case of Bowen and Ayer, wherein the two following very remarkable passages occur, assuming that transcription. is considered as having the same effect in law as tradition (2) " Mais en établissant cette règle (the decision of "the 15 L. " C. de rei vendic.) les lois romaines supposent que l'acheteur " qui a été mis le premier en possession avait en sa faveur un titre " *valable et régulier*, car une des maximes les plus constantes " de ces lois, *est que la tradition n'opère rien par elle-même* " si elle n'est fondée sur un juste titre," and further on : " La " possession ne peut être d'aucun effet pour lui, parce que n'é- " tant pas précédée *d'un titre légitime* elle ne peut être consi- " dérée que comme une voie de fait." Adverting to the unfounded pretensions of one of the parties, the author says : " Il a " aussi fait une fausse application de l'article 26, car quand cet " article dit qu'un contrat d'acquisition ne peut être opposé à " des tiers, tant qu'il n'est pas transcrit, il entend seulement que " jusqu'à la transcription, des tiers peuvent du chef *du ven-* " *deur* prendre hypothèque sur le bien vendu : Et c'est en for- " cer le sens, c'est en dénaturer la disposition, que d'en con- " clure *qu'un tiers peut s'approprier ce bien en l'achetant une* " *seconde fois du vendeur, avant la transcription du premier* " *contrat.*" Respondent in opposing to Appellants his own title, and seeking to invalidate the rights of the latter for the want of a supposed legal registration or tradition (for according to the policy of the law, the effects of the one or the other are identical,) will be met in almost every writer, who has treated the matter of sale, with the doctrine of the necessity of a legitimate title as a preliminary to acquire rights by tradition. The 11 law in the Digest. § 2, de act empt. et vend. in laying it down that tradition transfers property, adds that the vendor must be the owner *si quidem dominus fuit venditor*, and to the same effect are the laws, si duobus § 4, ff. de publiciana in rem actio, et uterque nostram 31, ff. § 2, act. empti et venditi. It is therefore manifest, that registration alone, can have no influence on the transmission of property.(3)

(1) Questions de Droit, *vbo* Transcription au Bureau des Hypothèques, s. 3rd, p. 425, Edit. 4o.

(2) 1 Rev. de L. et de Juris., Wolowski.

(3) 2 Battur, *Privilèges et Hypothèques*, 3e partie, ch. II. § 1. s. 3, nº 492.

But Appellants distinctly deny that in respect of the county of Ottawa, any law required registration, and that Respondent has acquired any right to the prejudice of Appellants, by a previous registration of his title. The question must be decided by a reference to Provincial Legislation. The 1st statute on this subject is the 10th and 11th Geo. IV, ch VIII, intituled, " An act to establish registry offices in the counties of Drummond, Sherbrooke, Stantead, Shefford and Missiskoui," containing provisions for the future only, and, therefore, having no application to the present cause. The next is the 1st Will. IV, ch. III, intituled, " An act to amend an act passed in the eleventh year of the reign of his late Majesty intituled, " An act to establish registry offices in the counties of Drummond, Sherbrooke, Stanstead, Shefford and Missiskoui, and to extend the provisions of the said act." By the second section it is enacted," that every person owning or claiming to own any landed or immoveable property whatsoever, situate within any of the said counties of Drummond, Sherbrooke, Stanstead, Shefford and Missiskoui, by virtue of any act or instrument in writing, executed *before* the passing of the act herein cited and amended, except the letters patent of His Majesty, shall before the 1st day of May,1832, enregister the same, in the registry office of the county in which such land or immoveable property shall be situate, and every such legal instrument as shall not be so enregistered, shall be utterly void and of no effect whatsoever, against subsequent purchasers for a valuable consideration."

The 3rd section enacts" that all the provisions of the act before cited and amended (the act of the 11 Geo. IV, ch. VIII, and not of the present act) shall extend to all such lands, and other immoveable property, as are or shall be hereafter held in free and common soccage, in the counties of Ottawa, Beauharnois and Megantic."

By the 4th section it is provided: " That from and after the " passing of the act, no act or deed in law, or instrument in " writing by which a mortgage or *hypothèque* has been or is " created, shall bind or affect as a mortgage, incumbrance or " *hypothèque*, nor shall any act, deed or instrument in law, " operate or bind as a conveyance any land or immoveable " property situate within any of the said counties of Ottawa, " Beauharnois and Megantic, save and except all such land " and immoveable property, as is or may be held *à titre de fief* " within the same, unless the said act, deed or instrument in " law, be enregistered in the registry office for the county in " which the said land or immoveable property is situate, " within one year after the passing of this act."

The last statute having relation to this question is the 2 Will. IV. ch. VII, whereby it is enacted "that the period assi-
" gned and limited by the said second clause or section of the
" before mentioned act, passed in the first year of His Majesty's
" reign, chapter the third, for enregistering certain acts or
" deeds in law, or instruments in writing in the said clause or
" section mentioned, shall further be and the same is hereby
" extended to the first day of May, which will be in the year
" of our Lord one thousand eight hundred and thirty-three,
" and that all such acts or deeds in law, or instruments in
" writing, in the said clause or section mentioned, and requi-
" red to be enregistered, which shall not be enregistered in the
" manner therein provided, before the said first day of May,
" in the year of our Lord 1833, shall be utterly void, and of
" no effect whatsœver against subsequent purchasers for a
" valuable consideration."

All the preceding provisions, so far as the acts, deeds, conveyances and other documents, made previously to the statute which includes the county of Ottawa, are concerned, do not require their registration. The provisions of the 11th Geo. IV, ch. VIII, the only statute affecting the past, are alone extended to the county of Ottawa, leaving the Statute 1 Will. IV, ch. I, to legislate for the future, and for the future only. The titles of Appellants are consequently not affected by any part of this legislation. It is therefore unnecessary to discuss the question how far titles, other than mere conveyances, and which are derived from marriage and succession ought to be registered and in what manner. It is sufficient for Appellants that they were under no obligation to register their titles, in order to arrive at the conclusion that Respondent could derive no benefit from the registration of his own.

The result of this opinion, in reference to the question as to what laws govern lands held in free and common soccage, as respects alienation of property, descent, dower and other rights of married woman, and in reference to that question only is perhaps a subject of regret. The inconvenience of two systems of law in the same country is manifest. Inclination would lead to an adverse conclusion, but it is for legislators to decree what ought to be, and for judges to declare the law as it is.

For the above reasons, it is thought the judgment of the court below ought to be reversed, and that Appellants should obtain the relief which they seek by the present appeal, in being declared the lawful owners of the property in question with the usual consequences of the adjudication against a possessor in bad faith, including the rejection of Respondent's claim for ameliorations, an opinion founded on the high autho-

rity, among others, of Pothier, (1) in cases presenting circumstances like the present one.

Judgment reversed. (3 *D. T. B. C.*, p. 309.)

STUART, H., Attorney for Appellants.

BLACK, the Honble. H., Counsel.

DRUMMOND (Atty. Genl.) & LORANGER, Attorneys for Respondent.

SUCCESSION VACANTE.—CURATEUR.—REDDITION DE COMPTE.

COUR DU BANC DE LA REINE, Québec, 29 juillet 1852.

Présents : SIR JAMES STUART, Baronnet, Juge en Chef, et ROLLAND, PANET et AYLWIN, Juges.

VALLEAU (Demandeur), Appelant, *et* OLIVIER (Défendeur), Intimé.

Jugé : Qu'un créancier qui a obtenu un jugement contre un curateur à une succession vacante, peut valablement diriger une action personnelle contre tel curateur pour lui faire rendre un compte de sa gestion, (*Sir James Stuart* dissentiente, sur le principe que le curateur aurait dû être mis en cause), jugement de la Cour Supérieure infirmée.

Il s'agissait d'une action portée contre le Défendeur, personnellement, pour lui faire rendre compte des deniers et effets entre ses mains, comme curateur à une succession vacante, de la part d'un créancier qui avait déjà préalablement obtenu un jugement pour sa créance contre le dit curateur.

Le Défendeur n'offrit aucune défense; et, néanmoins, la cour débouta le Demandeur de sa demande, sur le principe que l'action aurait dû être portée contre le Défendeur, en sa qualité de curateur, et non personnellement, ou du moins sur le principe que la succession n'était pas suffisamment représentée. Le jugement de la Cour Supérieure est comme suit :

Présents : BOWEN, J. en C., et DUVAL, juge. Jugement 24 décembre 1850.

Vu que cette action est intentée par le Demandeur, comme créancier de feu Charles Gortley, contre le Défendeur, personnellement, pour obtenir un compte de la gestion et administration que le Défendeur a eues ci-devant de la succession du dit feu Charles Gortley, en sa qualité de curateur à icelle ; et considérant que la succession du dit feu Charles Gortley n'est nullement représentée en la présente cause, et qu'en conséquence il n'est point constaté d'une manière légale qu'au temps de l'institution de la dite action le Demandeur était créancier de

(1) Poth., *Domaine de propriété*, n° 350.)

la dite succession pour aucune somme d'argent quelconque ; considérant, en outre, que le Demandeur n'a obtenu et ne peut obtenir, dans la présente action, une subrogation judiciaire aux droits de la dite succession contre le dit Défendeur, en sa dite qualité de curateur à icelle, déboute le Demandeur de son action.

AYLWIN, juge : Notre système de judicature n'exige point de formes spécifiques d'action ; encore moins autorise-t-il les cours de justice à suppléer des fins de non-recevoir. Il suffit que la partie ait formulé ses prétentions d'une manière intelligible. (1)

Dans le cas actuel, l'Appelant a allégué sa créance, son jugement contre le curateur, la saisie-arrêt, la comptabilité personnelle du Défendeur, comme ayant eu, comme curateur, l'administration des biens d'une succession vacante, et cela doit suffire.

L'on trouve dans Pigeau, une forme d'action absolument semblable à celle-ci. (2)

L'on prétend que la succession vacante devrait aussi être représentée dans cette cause : mais à quoi bon ? Elle n'y a aucun intérêt, puisque la condamnation personnelle d'Oliver tendrait à l'exonérer. Quant à la créance de l'Appelant, elle a été établie dans une précédente action contre le curateur. Je suis vraiment surpris qu'en présence des dispositions de l'acte de la Législature, la cour ait cru devoir soulever des difficultés de cette nature.

ROLLAND, juge : Je ne puis concevoir comment cette action en reddition de compte peut être autre que personnelle. Il est seulement nécessaire, dans l'action, d'alléguer que le Défendeur a été élu curateur, et que, comme tel, il est comptable aux créanciers de la succession, puis conclure, &c. Quand un Défendeur est poursuivi en une qualité donnée, et non personnellement, c'est que l'action est dirigée ou contre une succession, comme dans le cas du curateur, ou contre un mineur, comme dans le cas du tuteur, ou contre un interdit, &c. Mais la femme commune qui poursuit n'a pas besoin de se donner une qualité quelconque, il n'est pas non plus nécessaire de lui en donner une en la poursuivant comme telle, la communauté qu'elle invoque est un fait, et rien autre chose. C'est seulement quand un tuteur ou un curateur poursuivent dans l'intérêt qu'ils représentent, qu'ils doivent prendre qualité, et cela se conçoit.

Les actions sont de bonne foi, et qui dira qu'ici il résulte aucun désavantage au Défendeur pour sa défense de n'être pas assigné comme curateur. Sera-t-il dit que lui, n'ayant pas plaidé à l'action, la cour suppléera ce qu'on appellerait une fin de non-recevoir, à laquelle il a renoncé en ne la plaidant pas,

(1) Voyez 12 Vict., chap. XXXVIII, sec. 86.

(2) 2 Pigeau, pp. 499-500.

et cela sans intérêt quelconque pour la justice ? Mais l'on dit c'est un officier public. Il est nommé par le juge à la requisition des créanciers pour gérer les biens affectés à leurs créances ; il est leur mandataire, il leur est comptable aussi bien qu'à ceux des héritiers qui pourront paraître plus tard, voilà tout. (1)

La nomination d'un curateur, dans le cas de renonciation, ou d'abstention, ou même d'absence de l'héritier, ne crée autre chose qu'un administrateur de biens vacants.

L'on accorde contre le curateur, comme comptable, la contrainte par corps à défaut de rendre compte ou au cas de malversation. *Tous les comptables* y sont sujets. Il sont personnellement comptables, et, comme tels, contraignables. Dans le cas où un seul des héritiers est en possession, l'on ne nomme pas un curateur, et pourquoi ? parce que les biens ne sont pas vacants. De dire, par conséquent, que le curateur représente la succession, cela ne me paraît pas exact. Il est bien vrai que les actions contre la succession doivent être dirigées contre lui, car il faut les diriger contre quelqu'un, et il a qualité pour défendre, mais si l'action n'est pas contre *la succession*, elle est nécessairement personnelle contre lui, et c'est lui qui devra être condamné.

L'idée émise de faire représenter la succession ou d'avoir une subrogation de la succession, c'est-à-dire, d'héritiers qui sont inconnus, me paraît au moins nouvelle, je ne puis la saisir.

Ce que je vois de fâcheux dans cette affaire, c'est qu'un Demandeur qui a un droit d'action, qui ne conclut qu'à ce qu'il a droit d'obtenir d'après les lois de son pays, soit mis hors de cour par une pure subtilité, qui semblerait être, " que le créancier qui demande un compte ne poursuit pas le Défendeur en qualité de curateur," comme si cela était nécessaire, ou en aucune manière utile ; comme si dans le silence du Défendeur, qui ne dit mot, la cour craignait de faire un faux pas en condamnant le Défendeur à rendre compte de sa gestion comme curateur. Le Défendeur n'ayant pas défendu à l'action, la cour a suppléé, ce semble, une fin de non-recevoir qu'il n'invoquait pas, et à laquelle il renonçait, s'il avait droit de l'invoquer, un pur défaut de forme, et, sans doute, elle a cru essentiel que le Demandeur recommençât son action en donnant au Défendeur une qualité dans laquelle il devait plaider et se défendre contre les conclusions prises contre lui. Pour rejeter cette demande, évidemment bien fondée, il a fallu la considérer comme mal à propos intentée contre le Défendeur personnellement, et c'est là que cette cour trouve qu'a été l'erreur.

(1) Nouveau Dénizart., *verbo* curateurs à biens vacants ; Ibid., *verbo* biens vacants ; 2 Pigeau, pp. 479, 500, 510.

La qualité de curateur et sa gestion comme tel sont la base de l'action ; mais comme l'action n'est pas dirigée contre la succession, contre laquelle le Demandeur a déjà obtenu une condamnation, mais contre cette administrateur des biens vacants qui est tenu d'en rendre compte, le Demandeur le poursuit en reddition de compte. Que peut-il y avoir de plus raisonnable. Je tiens qu'en général dans aucune action, il est nécessaire de donner ce qu'on appelle une qualité au Défendeur, je veux dire pour l'assigner, à moins que l'action ne soit dirigée contre un corps ou contre un individu que le Défendeur représente ; car alors ce n'est pas lui, le Défendeur, contre lequel l'on demande condamnation. Tels sont les tuteurs des mineurs, les curateurs aux interdits et autres. Mais quand l'action est personnelle, quand c'est le Défendeur même qui doit être condamné, s'il y a lieu, qu'est-il besoin de lui donner une qualité ? Tous les jours l'on voit une femme mariée prendre ce qu'on appelle la qualité de commune, ou poursuivie en cette qualité. Ce n'est pas là une qualité, c'est son titre de propriété ou la cause de sa comptabilité en certains cas. L'on peut dire la même chose de l'héritier, car c'est toujours *en droit soi* qu'il est Demandeur ou Défendeur.

Nos actions sont de bonne foi ; qu'on allègue dans le libellé de la demande tout ce qui est nécessaire pour fonder la demande, voilà tout ce qu'on peut exiger ; qu'on examine si la demande paraît soutenue par les allégués, voilà toute la forme, sans avoir recours à des subtilités qui n'ont aucune utilité pour but. La loi d'aujourd'hui semble avoir eu en vue de l'empêcher.

Pour la définition de l'action personnelle (*vide* Merlin): " c'est celle par laquelle nous agissons contre celui qui est obli- " gé envers nous par contrat ou quasi contrat, délit ou quasi délit." De même un curateur peut être poursuivi personnellement. Il peut aussi poursuivre personnellement sans prendre aucune qualité, lorsqu'il demande quelque chose qui doit lui profiter, et alléguer sa qualité ou sa gestion comme un titre au soutien de sa demande ; tout cela se conçoit, Mais ici l'action est personnelle ; nous le déclarons par notre jugement, et cela ne peut pas être autrement, car ce n'est pas la succession dont il administre les biens qui est poursuivie, mais bien cet administrateur même pour rendre compte de sa gestion.

SIR JAMES STUART, Baronnet, Juge en Chef : Je diffère de la majorité de la cour, non pas sur des moyens de forme, mais sur la substance même du droit des parties. En effet, comment le créancier d'une succession vacante peut-il procéder sans la présence du curateur à cette succession, et sans qu'il soit entendu. L'action en reddition de compte est, sans aucun doute, une action personnelle, mais le curateur devait aussi être par-

tie à cette action. Les conclusions de la demande sont, non seulement que le Défendeur soit condamné à rendre compte, mais que le Demandeur soit payé des deniers de la successions qui se trouveront entre les mains du Défendeur. L'obligation de rendre compte est bien personnelle, mais les conclusion de l'action vont bien au delà. Ce n'est que dans le cas que le Défendeur se refuserait de rendre compte qu'il pourrait être condamné à payer *de bonis propriis*, s'il rend compte, le jugement qui interviendra sera contre la succession : c'est pourquoi, je suis d'avis qu'elle devait être représentée en cette instance.

Le jugement infirmant le jugement de la Cour Supérieure est comme suit :

La cour, considérant que l'action contre un curateur à une succession vacante, en reddition de compte de sa gestion et administration, ne peut être que personnelle, son obligation, comme comptable, étant personnelle, et qu'il est tenu de rendre compte de sa gestion des biens, sur la demande des créanciers, ou d'aucun d'eux ; et, que dans le cas actuel, la demande est régulièrement intentée, sans qu'il soit nécessaire que la succession y soit autrement représentée, non plus que d'aucune subrogation quelconque, le Demandeur agissant en son propre droit, comme créancier ; et qu'il y a eu erreur dans le jugement, dont est appel, a infirmé et infirme le dit jugement, savoir, le jugement de la Cour Supérieure rendu à Québec, le vingt-quatre décembre mil huit cent cinquante. Et la cour, rendant le jugement que la dite cour aurait dû rendre, condamne l'Intimé, Défendeur en Cour Inférieure, à rendre compte au Demandeur de sa gestion et administration des biens de la succesion de feu Ch. Gortley, comme curateur nommé à cette succession vacante, et ce sous quinze jours de la signification du présent jugement ; pour être procédé ultérieurement comme de droit, soit dans le cas d'un compte rendu, ou à défaut par le Défendeur de rendre le dit compte, dépens réservés. L'honorable Juge en Chef STUART *dissentiente.* (2 *D. T. B. C.*, p. 462.)

ANDREWS et CAMPBELL, pour l'Appelant.

CAIRNS, pour l'Intimé.

INTERDIT.

COUR DU BANC DE LA REINE, Montréal, 29 juillet 1852.

Présents : SIR JAMES STUART, Baronnet, Juge en Chef, et ROLLAND, PANET et AYLWIN, Juges.

DE CHANTAL et al. (Défendeurs en Cour Inférieure), Appelants, et DE CHANTAL (Demanderesse en Cour Inférieure), Intimée.

Jugé : Qu'une interdiction et la nomination d'un conseil, obtenus à la requête de l'interdit lui-même, sont de nul effet, quant à un créancier avec lequel l'interdit a contracté ; que le contrat est valable, quoique le conseil n'y fût pas partie, si l'interdiction n'a pas été dénoncée au créancier, et si elle n'a pas été inscrite au tableau des interdits.
Jugement de la Cour Inférieure confirmé.

L'action instituée par l'Intimée, avait pour objet de faire condamner le Défendeur Louis de Chantal, l'Appelant, à lui payer la somme de £600 0 0, avec intérêt du 1er avril 1848, à elle due en vertu d'une obligation qu'il avait consentie, pour valeur reçue devant Belle et confrère, notaires, le 31 mars 1848, à feu Joseph Beauchamp, son mari, dont elle était bien fondée à exercer les droits. Les Appelants, Louis de Chantal et son épouse, répondirent à cette action que, longtemps avant la passation de l'obligation ci-dessus mentionnée, l'Appelant, par suite de son grand âge, excédant 83 ans, et de ses infirmités morales et corporelles, était devenu incapable de gérer ses affaires, au point qu'il devint nécessaire de l'interdire, et de lui faire appointer un conseil, ce qui fut fait le 30 mars 1848 ; que le dit Appelant était devenu par là incapable de contracter aucun engagement sans l'assistance de son conseil, et qu'ainsi la dite obligation était nulle, l'ayant été sans l'assistance de son conseil. Que, dès avant le dit jour, 31 mars 1848, l'Appelant avait payé tout ce qu'il pouvait devoir à l'Intimée et à feu Joseph Beauchamp, son mari, en vertu de cette dernière obligation, dont le dit Beauchamp avait, par divers reçus sous seing privé, reconnu le paiement.

L'Intimée, dans ses réponses, maintenait que l'interdiction de l'Appelant n'était qu'une interdiction volontaire, dépourvue des formalités légales qui pouvaient la faire militer contre elle, qu'elle n'avait été imaginée que pour frauder son mari.

L'Intimée soutenait que la prétendue interdiction de l'Appelant n'en est pas une. Le nom de l'interdit ne fut jamais mis au tableau des interdits, ainsi que le porte l'ordonnance du juge qui a prononcé cette interdiction, elle n'a jamais été signifiée à aucun notaire, non plus qu'à l'Intimée ou à feu son époux.

Le jugement de la Cour Inférieure a déclaré l'Intimée bien fondée, en droit et en fait, et a maintenu son action. C'est de ce jugement qu'est le présent appel.

SIR JAMES STUART, Juge en Chef : L'Intimée, Demanderesse en Cour Inférieure, prétend que cette interdiction est nulle et a été obtenue par fraude. Anticipant la défense, elle a allégué, dans son action, la nullité de cette interdiction, tandis qu'elle aurait dû attendre qu'on la lui opposât, pour en demander la nullité. L'on avait d'abord opposé à cette action une défense en droit, qui eût dû réussir si on ne l'eût retirée. Au mérite, l'Appelant, le Défendeur en Cour Inférieure, a plaidé qu'il était interdit lors de la passation de l'obligation, qu'elle lui avait été surprise par fraude et sans bonne et valable considération, qu'il était alors frappé d'aliénation mentale et incapable de s'obliger, enfin que l'obligation avait été acquittée.

Nous sommes d'avis que l'interdiction est nulle et frauduleuse. Elle a été accordée sur la demande du Défendeur, auquel on donne un conseil, et que l'on interdit en même temps. La nomination d'un conseil est essentiellement différente de la nomination d'un curateur à un interdit : le premier n'est donné que pour aviser et assister une personne faible d'esprit ; le second a l'entière administration des biens de l'interdit. D'ailleurs, avis aurait dû être donné de cette interdiction. La fraude perce de tout côté dans cette procédure. L'aliénation mentale, alléguée de la part du Défendeur, était feinte et simulée, dans la vue de frauder la Demanderesse.

ROLLAND, juge : Je concours dans le jugement, mais je ne suis pas d'avis que la défense en droit était fondée ; la Demanderesse sachant que le Défendeur avait un conseil a dû le mettre en cause de suite pour demander la nullité de l'interdiction. Je n'hésite pas à dire que toute la conduite du Défendeur en cette cause est entachée de fraude.

Le jugement de la Cour Inférieure en date du 7 janvier 1852, est comme suit : " The court, considering that Defendants have " failed to establish, that, at the time of the passing of the " obligation of the 31 March, 1848, he, Defendant, Louis De " Chantal, was legally interdicted, or that there existed any " legal incapacity in him at the time of the execution of the " said *acte* to bar, or prevent him from entering into the same, " and considering, further, that the pretended incapacity ari- " sing from the nomination of a counsel to aid and assist him " Defendant, in the execution of any acts, or deeds, or obliga- " tions tending to the alienation of the immoveable property of " him Defendant, and without whose presence and consent, it " is contended that said acts, deeds or obligations are by law " illegal, null and void, as set out in said plea or exception, " secondly pleaded by Defendants, cannot by law have the

" legal effect of a judgment of interdiction, inasmuch as the " simple nomination of a counsel, without the same being pu- " blicly entered and inscribed on the *tableau des Interdits*, and " without notice to the party contracting with said *Interdit*, " cannot by law operate as a legal bar or impediment to pre- " vent said *Interdit* from entering into and contracting any " obligation ; and considering that, at the time of the execu- " of said obligation, of the 31 March 1848, the nomination of a " counsel to Defendant, Louis de Chantal, was wholly unknown " to Plaintiff, and had not been *affichée* nor inscribed on the " *tableau des Interdits*, as by the order of the judge and by " law it ought to have been, doth dismiss said exception, thereby " secondly pleaded by Defendants ; and further, considering " that Defendants have wholly failed to establish, by legal evi- " dence, any of the matters pleaded in defence to this action " by the peremptory exception by them thirdly pleaded to said " action, doth also overrule and dismiss the same ; and consi- " dering that Plaintiff hath established by legal evidence the " *indebtedness of Defendants* by the obligation of the 31 " March, 1848, doth order, adjudge and condemn Louis De " Chantal to pay to Plaintiff the sum of six hundred pounds, " with interest from the 1st of April, 1849, until actual pay- " ment, the said sum of six hundred pounds, being the amount " of said obligation made by Louis De Chantal, to and in favor " of the late Joseph Beauchamp, passed before Belle and col- " league, notaries public, on the 31 March, 1848. "

Le jugement de la Cour d'Appel confirme le jugement de la Cour Supérieure. (2 *D. T. B. C.*, p. 469.)

BURROUGHS, pour l'Appelant.

DUMAS et CHERRIER, pour l'Intimée.

VOITURIER.—RESPONSABILITE.

SUPERIOR COURT, Quebec, 19 juillet 1852.

Present : DUVAL and MEREDITH, Justices.

SCOTT *vs.* HESCROFF.

Lorsque des marchandises, qui doivent être livrées "à ordre", sont déchargées d'un vaisseau, à l'expiration du délai accordé par la loi à l'importateur pour les faire décharger, le maître du vaisseau n'est pas responsable des dommages qu'elles peuvent éprouver, après qu'elles ont été déposées sur le quai.

Plaintiff's declaration alleged that Morewood, Brothers & Co., of Liverpool (who also traded at New-York), shipped 96 bundles of galvanized metal, in good order, of the value of

£239, on board, the ship "Glenswilly," of which Defendant was master, on the 27th February, 1851, at Liverpool, and that Defendant, as master, undertook to convey the same thence to Quebec, to be delivered there, unto "order, or their assigns," That the shippers subsequently endorsed the bill of lading signed by Defendant, and delivered it to Plaintiff; That Defendant, upon the arrival of the ship at Quebec, landed said metal upon one of the wharves, without notice to Plaintiff, or without advertising for a consignee, according to usage and custom at the port of Quebec, and that, while on the wharf, the metal was damaged by rain, to the amount of £250, which Plaintiff claimed.

Defendant pleaded a *défense au fonds en fait*,

The evidence established that the bill of lading was to "order, or their assigns," and had been endorsed to Plaintiff without any knowledge thereof having been given to Defendant. The "Glenswilly" arrived at Quebec, on the 9th May, 1851, and a custom house officer was then placed on board, who remained until the whole of the cargo had been discharged. The consignee being unknown to Defendant, he caused enquiries to be made among parties who were likely to be importers of galvanized metal, in order to discover the owner; among others, Plaintiff was called upon, and informed that 96 bundles of galvanized metal were on board from Liverpool, and he was asked if he were the consignee, he replied that he was expecting that quantity of metal from Liverpool, but that, not having received any advice of the shipment on board the "Glenswilly," he could not take it. An advertisement for a consignee had been posted up in the exchange. After the lapse of 12 days, an order was procured from the collector of the customs, addressed to the custom house officer on board, directing him to land the metal, and convey it to the customs' warehouse. The metal was landed, on the 21st May, and placed on a wharf, where it remained until the 26th, when Plaintiff claimed it, having received, the day before (Sunday), a letter from the New York firm inclosing the bill of lading, and stating that, in consequence of an error on the part of the Liverpool shippers, the bill had been sent to a wrong party. During the interval between the 21st and 26th, the metal had been damaged by rain to the amount of £87. The custom house officer who had been on board, deposed that the metal could not have been landed without his permission, and that he would have had it sent to the warehouse, but was prevented by press of business; that it was then under the control and reponsibility of the custom house authorities, and that, while the metal was on the wharf, a watchman from the custom house had charge of it.

HOLT, for Plaintiff: Defendant was bound to advertise in the newspapers for a consignee, and, in default of discovering one, it was his duty to place the metal in a warehouse, where it would have been protected from damage. Plaintiff did not know the metal was his until five days after it had been landed, and, therefore, could not claim it,

POPE, for Defendant: It is not proved that the general custom at Quebec is to advertise in the newspapers. A special notice was nevertheless given to Plaintiff. The whole question must be decided by the interpretation to be given to the Provincial Statute regulating the duties of Customs (1). The 12th sec. enacts, " That every importer of any goods by sea, " or from any place, without this province, shall, within five " days after the arrival of the importing vessel, make due entry " inwards of such goods and land the same... and such person " shall at the same time pay down all duties upon all goods " entered inwards... and in default of such entry and landing... " or payment of duty, IT SHALL BE LAWFUL FOR THE OFFICERS " OF CUSTOMS TO CONVEY SUCH GOODS TO THE CUSTOMS " WAREHOUSE; and if such goods be not duly entered and the " duties due thereon paid, within three months from the date " of such warehousing, TOGETHER WITH ALL CHARGES OF RE- " MOVAL and warehouse rent, the same shall be sold by pu- " blic auction... and the proceeds thereof shall be applied, " FIRST, to the payment of duties and charges and the over- " plus, if any, after discharging the vessels lien, shall be paid " to the owner of the goods." (2) The metal could not be landed from the vessel until the entry had been made, and if it were landed without such entry, it would have been forfeited (3) in which case a different action should have been brought but, if the metal were landed after the receipt of a proper order, then it was no longer in the custody of Defendant. The customs had a lien on the metal preferable to that of Defendant for freight, (4) and, therefore, it was lawful for them to take possession, in default of entry or payment of the duties; and, consequently, it was lawful for Defendant to give them possession. As the customs were by law directed to convey the goods to the warehouse, in default of entry or payment by the importer within the five days, and as neither entry nor payment had been made within 12 days, when the metal was landed, it follows that, when it was so landed, it was entirely in

(1) 10 & 11 Vic, ch. XXXI.

(2) V. la sec. 37 du ch. XXXII des Statuts Revisés du Canada de 1886.

(3) 10 et 11 V, ch. XXXI, sec. 8.

(4) Ib., sec. 12.

the custody of the custom house, whose duty it was to place it in the warehouse, and that if it was damaged afterwards, Plaintiff might have a recourse against other parties, but not against Defendant, who had been divested of the custody and possession of the goods in pursuance of the statute.

The court, considering that Plaintiff did not, within five days after the arrival of the ship "Glenswilly," in which the ninety-six bundles of galvanized metal mentioned in Plaintiff's declaration, were imported, cause the said ninety-six bundles of galvanized metal to be entered inwards, as by law he was bound to do; and considering that, by reason thereof, and of Defendant not having received any information from the shippers of the said ninety-six bundles of galvanized metal, or from Plaintiff, being the person to whom the said ninety-six bundles of galvanized metal were to be delivered by Defendant, he, Defendant, was justified in allowing the officers of Her Majesty's Customs to take possesion of the said ninety-six bundles of galvanized metal; and, considering also that it is established by the evidence adduced in this cause, that, at the time the said ninety-six bundles of galvanized metal sustained the damage for which Plaintiff now asks to make Defendant liable, said ninety-six bundles of galvanized metal were in the custody and possession of the Officers of Her Majesty's Customs, in consequence of the neglect aforesaid on the part of Plaintiff, and had ceased to be in the possession of Defendant, the court doth dismiss this action. (2 *D. T. B. C.*, p. 477.)

HOLT & IRVINE, for Plaintiffs.

POPE, for Defendant.

BORNAGE.—DEPENS.

IN THE QUEEN'S BENCH, Quebec, 29 juillet 1852.

APPEAL SIDE.

Before Sir JAMES STUART, C. J., and ROLLAND, PANET and AYLWIN, Justices.

WEYMESS et al. (Plaintiffs), Appellants, and COOK (Defendant), Respondent.

Jugé: Que si dans une action de bornage, le Défendeur nie au Demandeur son droit d'action, il doit être condamné aux dépens. (1)

On the sixth day of December, 1850, Appellants instituted an action *en bornage* against Respondent, returnable in the Circuit Court, for the Quebec Circuit, to cause metes and

(1) V. art. 478 C. P. C.

bounds to be run and drawn between their respective properties, in due course of law.

Respondent put in two pleas: 1st, the general issue, and 2nd, a perpetual peremptory exception, by which it was alleged that he Respondent, had always been ready and willing to cause the lines and boundaries between their said respective lots of ground or emplacements to be run by surveyor, according to law, and was still ready and willing so to do; and that he never was requested by Appellants, to have the said lines run, nor had Respondent ever refused so to do. No evidence was adduced by either party. By a consent motion made on the twenty-fourth day of April, 1851, George Austin, a land surveyor, was appointed by the court to draw the line of division separating the respective properties of the parties, according to their title deeds, and on the seventh day of May, 1851, he filed his report, with a plan, shewing the lines of division between the parties, and how Respondent encroached on the land of Appellants, to the distance and measurement of four inches in front, and gradually widening to thirteen inches in the rear, containing about sixty-four superficial French feet. On the twenty-seventh day of December last (Appellants having previously moved for the homologation of the surveyor's report, and inscribed the cause for final hearing), the Circuit Court pronounced the following judgment:—(Present: POWER, Justice.)

"The court having heard the parties, by their respective "counsel, upon the motion of the Plaintiffs of the twenty-"fourth instant, doth grant the said motion, and, in conse-"quence, homologates the report of George Austin, land "surveyor, filed in this cause, the seventh day of May last, to "be executed between the parties; and the court condemns "each party to pay one half of the costs of survey, and con-"demns the Plaintiffs to pay the costs of the suit."

From this judgment, an appeal was instituted, and the cause having been brought before the Superior Court, at Quebec, was heard before Bowen, Chief Justice, and Bacquet and Duval, Justices, and the following judgment rendered:

"The court considering that Plaintiffs have not proved "the material allegations contained in their declaration, and, "in particular, that previously to the institution of this action, "Plaintiffs had demanded of Defendant to cause metes and "bounds to be placed to divide the property of them Plaintiffs, "from the adjoining property of Defendant; and considering "further the *consent* given by Defendant, on the return of "the writ *ad respondendum* issued in this cause, that metes "and bounds be placed to divide said property. And that, in "the judgment from which the present appeal hath been

" instituted, to wit : the judgment rendered in this cause, in the " Circuit Court, Quebec Circuit, on the 27th day of December, " 1851, there is no error. It is adjudged that said judgment be, " and the same is hereby, in all things affirmed, with costs to the " said Patrick Cook, Respondent, against said Ann Weymess, " wife of Thomas Kinchelo, and Thomas Kinchelo, Appellants."

This judgment was rendered by the majority of the court, viz: BACQUET and DUVAL, Justices; BOWEN, Chief Justice dissenting, for the following reasons set forth in the said jugment, as follows:

" Because the judgment rendered in the court below hath " been rendered in an action *en bornage*, Plaintiff's land having " been encroached upon by Defendant, to the extent of sixty- " four surperficial feet, and Plaintiffs having been condemned " to pay the costs of the action, on the ground that Plaintiffs " had not proved that Defendant had refused to proceed to a " *bornage*; whereas, on receipt of the summons, Defendant, to " avoid costs, ought by protest, to have notified Plaintiffs of " his supposed readiness to proceed to such *bornage*, and there- " by prevent the return of the action into court, instead of " which, by his *défense au fonds en fait*, he denies Plaintiffs' " right, and demands the dismissal of the action, as he also " does by the conclusions of his perpetual exception. Wherefore " His Honor the Chief Justice is of opinion that Plaintiffs " ought to have the whole costs of suit, or that, under the most " favorable view of the case of Defendant, the costs should " have been equally divided between them, and Appellants " should have the costs in appeal."

It is from the above judgment that the appeal had been brought. The complaint of the Appellants was limited simply to that portion of the judgment of the Circuit Court, confirmed by the court below, which condemned them to the costs of suit.

On behalf of Appellants it was said that the Circuit Court, in condemning Appellants to the costs of the action, based its judgment on the assumption of the obligation in law of Appellants to put Respondent *en demeure*, prior to the institution of their action *en bornage*, and had overlooked the two pleas put in by Respondent, in one of which he put in issue the right of action of Appellants, and by both prayed for the dismissal of Appellants' action.

The French law, in force in this country, gives the action *en bornage* to neighbours, without making it necessary that an extra judicial demand should be made, and the only plea that could defeat this action would be, subsisting boundaries still visible (1).

(1) Dictionnaire de Droit (Ferrière), *vbo* action de bornage, vol. 1, page

The modern law of France is analogous to the old on this subject.

Viewing this case most favorably for Respondent, all he could possibly have expected was that the costs of suit in the Circuit Court would have been divided between the parties.

That there were ample and substantial reasons in the case, from the pleadings set up by Respondent, and from the report of the surveyor named by the parties themselves, to have justified the Circuit Court in condemning the Respondent to all the costs of suit. 1. Respondent, by his *défense au fonds en fait*, has put in issue every material fact alleged by Appellants, their right of property, contiguity, &c., and, by his peremptory exception, has alleged matters, which, even if proved by him (and they were not), Appellants have already shewn could not preclude them from their right of demanding a judicial *bornage;* and concludes in both pleas, that the action of the Appellants be dismissed with costs. The action of Appellants was, notwithstanding these pleas of Respondent, maintained by the Circuit Court; and, as Appellants conceive, ought to have been so, with costs against Respondent because of his rash resistance to Appellants' just and legal demand (1).

2. By the surveyor's report, homologated by the judgment of the Circuit Court, it is ascertained that Respondent encroaches on the property of Appellants, to the extent of sixty-four superficial feet, and this extent of ground is declared to belong to Appellants, and, for this reason also, Respondent ought to have been condemned to costs (2).

SIR JAMES STUART, Bart., C. J. : This appeal is in relation to a condemnation to costs against a Plaintiff in an action EN BORNAGE. We are of opinion that, under the circumstances of

37, 1 col; Idem, *vbo* bornes, vol. 1, page 196, 1 col; 2 Guyot, *Répertoire de Jurisp.*, pp. 451, 452, *verbo* bornage, borne; 2 Pothier., *Cont. de soc.*, n° 231, p. 620: "Cette action est aussi du nombre de celles qu'on appelle *judicia duplicia*, dans lesquelles chacune des parties, tant celle qui a donné la demande que celle contre qui elle est donnée, est tout à la fois Demandeur et Défendeur; L. 10, *ff* fin. reg. Car par cette action chacune des parties, celle qui est assignée aussi bien que celle qui a assigné, réclame chacune l'une contre l'autre ce qui par le bornage sera déterminé faire partie de l'héritage."

2 Guyot, *Rép. Jur.*, verbo *bornage*, p. 452: "La même action est encore du nombre de celles qu'on appelle doubles ou réciproques, et dans lesquelles chacun des adversaires, tant celui qui a formé la demande que celui contre qui elle est formée, sont tout à la fois Demandeurs et Défendeurs. *En effet chacune des parties réclame contre l'autre ce qui par le bornage sera prouvé faire partie de son héritage.*"

1 Fournel, *Voisinage*, pp. 237, 238, 239, 240.

(1) 1 Fournel, 249; 1 Merlin, *Rép.*, *Jur.*, verbo *bornage*: "Ce partage de frais cesse d'avoir lieu, s'il y a eu contradiction de la part d'un des deux voisins qui a succombé."

(2) Pardessus, n° 129, 190; 3 Toullier, n° 180, p. 124.

the case, Respondent (Defendant in the court below), ought to have been condemned to costs. His pleas were calculated to defeat Plaintiff's action and to prevent the *bornage*. In cases of this kind, costs ought generally to be divided between the parties. But, in this instance, Defendant ought to have been condemned to costs. His defence denied Plaintiff's right of action ; subsequently he abandoned that plea, and consented to the appointment of a surveyor, it is exactly as if his plea had been dismissed. It is an error to think that Plaintiff was bound before bringing his action, to summon his neighbour to draw lines. The judgment of the court below must be reversed.

AYLWIN, Justice : I concur in this judgment, but I must state that, in this matter, wherein the value of the property in contestation is so small, it is to be regretted that the costs are so very enormous.

The court, considering that Respondent in the Circuit Court by two several pleas, contested the right of Appellants, to have and maintain this action, on which pleas, issues were joined by Appellants ; and considering that Respondent, afterwards, waived and abandoned those pleas, by a consent rule for establishing boundaries, as prayed for, by Appellants ; and considering also that the costs of the said unfounded defence, thus set up by Respondent, as well as one half of the costs of the action, were justly and legally chargeable against him ; and that the Circuit Court, nevertheless, condemned Appellants to pay the costs of this suit. It is adjudged, that the judgment appealed from, namely, the judgment of the Superior Court rendered on the seventh day of April, 1852, in so far as the same relates to costs, be and the same is hereby reversed, annulled and made void ; and, proceeding to render such judgment in the premises, as by the court below ought to have been rendered, it is further adjudged, that so much of the judgment of the Circuit Court as relates to the costs of the suit, be and the same is hereby reversed, annulled and made void ; and also so much of the said judgment of the said Superior Court as relates to costs, be and the same is hereby reversed, annulled and made void ; and it is further adjudged that the costs of this action, in the said Circuit Court, be equally borne and paid by Appellants and Respondent, except those incurred on the pleas of Respondent in the said Circuit Court ; and it is adjudged that Appellants do recover their costs, on the said last mentioned pleas, from and against Respondent ; and it is further adjudged that Appellants do recover their costs as well in the said Superior Court as in this court, from and against Respondent. (2 *D. T. B. C.*, p.486.)

CANNON, for Appellants.

ANDREWS & CAMPBELL, for Respondent.

APPEL.

SUPERIOR COURT, Quebec, 1er mars 1852.

Before BOWEN, Chief Justice, and DUVAL, Justice.

RUSSELL et al., Appellants, and GRAVELEY, Respondent.

Le jugement obtenu par la Demanderesse en Cour Inférieure excédait £15, courant, la Demanderesse émana un writ de saisie-arrêt, sur lequel jugement fut rendu pour une somme excédant aussi £15. Les Appelants étaient intervenus dans la cause réclamant £4 13 6, des argents saisis-arrêtés, et se croyant lésés par le jugement rendu sur la saisie-arrêt, ils en avaient appelé.

Jugé : Que dans l'espèce la demande des Appelants n'excédant pas £15, ils n'avaient aucun droit d'appel.

Respondent was Plaintiff in the court below, and having obtained a judgment against Defendants, Goodman and others, for the sum of £48, subsequently sued out a writ of *saisie-arrêt* in the hands of Cole. Garnishee declared he had in his hands, belonging to Defendant Goodman, the sum of £22. Subsequently to the Garnishee making his declaration, Appellants filed an intervention, in the cause claiming to be paid by privilege the sum of £4 13s. 6d, upon the monies in the hands of the Garnishee. Whilst the proceedings in the cause were in this state, Plaintiff and Respondent moved for judgment against Garnishee, the court allowed the motion, and judgment was thereupon pronounced against Garnishee, on the 31st day of December, 1851.

It was from this judgment that the present appeal had been instituted, and, upon the return of the record before the Superior Court, Respondent moved, " that all right and claim of Appellants founded upon the appeal in this cause instituted be declared forfeited, inasmuch as the claim of Appellants in and by their intervention made does not amount to or exceed fifteen pounds.

LELIÈVRE, for Respondent : The right of appeal from judgments rendered in the Circuit Court for Lower Canada, to this court, is regulated by the 53d sec., 12 Vict. cap. XXXVIII, by which it is enacted, that an appeal shall lie to the Superior Court from any judgment rendered by the Circuit Court, in any suit or action in which the sum of money or the value of thing demanded shall exceed £15 ; now the amount demanded by Appellants is only £4 13s. 6d., their interest does not exceed that amount, it is manifest therefore that they do not come within the provision of the 53d section just cited. If Respondent had contested the intervention of Appellants, and had failed in her contestation, would she have had a right to claim an appeal in a matter which amounted only to the sum of

£4 13s. 6d. ; clearly not. The rule must work both ways, and if Respondent could have had no appeal in the case of a contestation, it follows that Appellants can have no greater right. It is not the right of Respondent that is in question, her rights are settled by the jugdment upon the *saisie-arrêt* issued in the cause. The rights to be submitted to the court in virtue of the appeal instituted are the rights of Appellant to the extent of £4 13s. 6d. and no more. (1)

ANDREWS, for Appellants : The judgment sought to be appealed from is not a judgment upon the intervention of Appellants by which they claim a sum less than £15, but it is a judgment upon Respondent's demand for a sum exceeding £15, *quoad* which demand Appellants were *excipients* or Defendants. If the judgment upon Respondent's motion had been adverse to her, she would have had the right to appeal, she must therefore be subject to her adversaries' having the same right ; *eadem debet esse ratio commodi et incommodi.*

It cannot be pretended that it is the amount of the Appellants' interest that decides their right to appeal, for it is beyond doubt, that a party demanding £20 and obtaining judgment for £15 only, may appeal though manifestly the amount of his interest is but to the extent of £15. Neither is it the amount for which the judgment is rendered (although if it were, the Appellants' right to appeal would be evident) that regulates the right of appeal ; as in an action for £20 and a judgment for £15, Plaintiff would be entitled to appeal.

The 82nd sec. of the 12 Vict., chap. XXXVIII, enacts that " whenever the right to appeal from any judgment of any " court is dependant upon the amount in dispute, such amount " shall be understood to be that *demanded* and not that reco- " vered, if they be different. " The question here then is, what is the amount demanded in the cause in which the judgment complained of was rendered. The answer is a sum exceeding £15, rendered upon Respondent's motion on her own demand. Had the judgment, in consequence of a contestation *en fait ou en droit* of Appellants' intervention been given upon their intervention, it being for a less sum than £15, unquestionably they would have had no appeal. A case analogous to the present came before the Court of Queen's Bench.

There, an execution issued for an amount (non appealable) to which execution Defendant filed an opposition pleading compensation, by another judgment for an amount (appealable): this opposition being dismissed, an appeal from the judgment dismissing it was denied. The Chief Justice Sir JAMES STUART, in rendering the judgment of the court, stated

(1) 12 Vict., cap. XXXVIII, secs. 53 and 82 ; 2 Howard's Rep., 73.

the reason to be "Because the *execution* is the "*demand*, the "*opposition* is only an *exception* to this demand, it is then "the execution that must regulate the appeal." The opposition was by the court held not to be the demand, then how can the intervention here be deemed the demand. There is no distinction to be made between an opposition and an intervention, an intervention after judgment is an opposition, an opposition before judgment is an intervention, every intervening party or opposant is *quoad* his own intervention or opposition, a Plaintiff, and the party contesting them is an Excipient or Defendant. But every Intervening Party, Opposant, *quoad* the party whose right he contests, becomes an Excipient or Defendant, and if that party is a Plaintiff, then clearly the judgment rendered in the court below was upon Respondent's demand, to which we were excipients: it could not have been upon Appellants' intervention since that is still pending and unadjudicated upon. Had Respondant pursued the more correct course of moving for an order to have the monies in the hands of the *tiers-saisi* paid into court, to await a judgment of distribution, and thereupon by the clerk's report of distribution she had found herself excluded from a share of the monies, the whole amount having been given to other parties, and upon her contestation of such report a dismissal of her contestation had followed, she would have had an undoubted right to appeal from such judgment; then if on the other hand, instead of having been excluded, she had been collocated for the whole amount of her demand, would not such other parties have had the same right to appeal, having contested her collocation and failing therein, *eadem debet esse ratio commodi et incommodi*, and if they could have appealed from that judgment, where the merits of their intervention had been considered and where it might be contended the judgment was given upon it, which was for an amount non-appealable, a *fortiori* would they have that right where their invention has been totally overlooked, and where the judgment has been evidently rendered upon Plaintiff's demand for a sum appealable. In the case now under consideration, Appellants' intervention was never brought under the consideration of the court below, the judgment was obtained by surprise, there had been no pleading, no *enquête*, nor any hearing upon Appellants' intervention, and therefore, there could have been no judgment upon it. The judgment, on the contrary, was given upon Plaintiff's demand which was for a sum exceeding £15, and from which judgment and appeal lies according to the 53d sec. of the 12th Vict., ch. XXXVIII, which is in these words. "That from any judgment rendered "by the Circuit Court in any suit or action in which the sum

" of money demanded shall exceed £15 currency, an appeal " shall lie to the Superior Court."

If this court now decides this appeal against Respondent, her demand exceeding £20 sterling, she may again appeal to the Court of Queen's Bench. But the scale of justice cannot hang so unevenly as to grant her *trois degres de justice* or gradations of tribunals, and allow her adversary but one.

The court dismissed the appeal.

JUDGMENT: The court having heard the parties by their counsel respectively, upon the motion of the said Emma Gravely, Respondent, that all right and claim of Appellants founded upon the appeal in this cause instituted, be declared forfeited and said appeal dismissed, it appearing that the amount claimed by Robert Henry Russell and John Partington Russell, as intervening parties in the court below, is the sum of four pounds, thirteen shillings and six pence, and no more: It is hereby ordered and adjudged that Appellants, Robert Henry Russell and John Partington Russell, have forfeited all right and claim founded on the said appeal, and that said appeal is hereby dismissed. (2 *D. T. B. C.*, p. 494.)

ANDREWS and CAMPBELL, for Appellants.

LELIÈVRE and ANGERS, for Respondent.

ENREGISTREMENT.

COUR SUPÉRIEURE, Québec, 31 mai 1852.

Présents: DUVAL et MEREDITH, Juges.

CARRIER, Demandeur, *vs.* ANGERS, Défendeur, et DIVERS, Opposants.

Jugé: Que la destruction d'un titre par force majeure ne peut excuser le défaut d'enregistrement quant à un tiers; que l'enregistrement par sommaire n'opère que pour ce qui y est contenu; que l'enregistrement d'un titre-nouvel ne peut préjudicier à un tiers qui a enregistré antérieurement.

Il s'agissait en cette cause de la contestation d'un rapport de distribution, entre sir H. J. Caldwell et F. X. Larue, sous les circonstances suivantes:

Le 20 janvier 1827, Caldwell vend à Guénard un emplacement, moyennant une rente constituée de £3 au capital de £50. En janvier 1834, la minute de cette acte de vente est détruite dans un incendie. Le 14 octobre 1842, Guénard vend à Angers ce même emplacement, pour la somme de £212 10, et en outre à la charge de payer à Caldwell la rente constituée de £3. Le 19 octobre 1842, Guénard fait enregistrer cet acte

par sommaire, pour la conservation de son prix de vente, £212. 10, mais, dans ce sommaire, il n'est pas fait mention de la rente constituée due à Caidwell. Le 11 mars 1839, Larue avait prêté £100 à Angers, et fait enregistrer son titre le 30 décembre 1844. Le 19 septembre 1851, Caldwell prend un titre-nouvel de Angers, pour sa rente constituée, et le fait enregistrer le 22 décembre 1851.

L'emplacement ayant été vendu, il s'agissait d'en distribuer le prix entre Caldwell et Larue.

Caldwell, dans son opposition, allègue qu'il a été empêché d'enregistrer son titre originaire par force majeure, à cause de sa destruction, en 1834, dans un incendie ; il invoque en sa faveur l'indication de paiement contenue dans l'acte de vente de Guénard à Angers, et l'enregistrement de cet acte par Guénard, la passation du titre-nouvel, et l'enregistrement d'icelui en 1851, et conclut à ce qu'il soit colloqué en préférence à Larue.

Le projet de distribution colloquait Caldwell en préférence à Larue. Ce dernier le contesta sur le principe : 1° que l'acte originaire constitutif de la dette, l'acte de 1827, devait être enregistré, et ne l'avait pas été ; 2° que la force majeure invoquée ne pouvait préjudicier à un tiers, qui avait prêté son argent avec bonne foi, et qui avait enregistré son titre ; 3° que l'acte détruit pouvait être suppléé par un titre-nouvel ou un jugement, et que Caldwell avait eu depuis 1834 à novembre 1844, pour obtenir cet acte supplétoire ; 4° que l'enregistrement fait par Guénard ne pouvait être utile à Caldwell, en ce que cet enregistrement, fait par sommaire, ne contenait rien au sujet de sa créance (1) ; 5° enfin, que l'enregistrement du titre-nouvel, en 1851, ne donnait à Caldwell une hypothèque qu'à compter du 22 décembre 1851, tandis que celle de Larue datait du 30 décembre 1844. Il soutenait encore que le privilège du bailleur de fonds, soit qu'il fût antérieur, soit qu'il fût postérieur à l'Ordonnance de la 4 Vict., ch. XXX, devait, dans tous les cas, être enregistré. La créance de Caldwell reposait sur un acte antérieur, celui de 1827, et sur un acte postérieur, celui du 14 octobre 1842, vente par Guénard à Angers. Caldwell n'était pas présent à ce dernier acte, qui, quant à lui, n'avait pas été enregistré.

La Cour maintient la contestation de Larue.

JUGEMENT : La cour, considérant que la réclamation de Larue a été bien et duement enregistrée le 30 décembre 1844 ; que Sir H. J. Caldwell a négligé de faire enregistrer la sienne, et que l'enregistrement du titre-nouvel fait le 22 décembre 1851

(1) Troplong, *Priv.*, p. 230, n° 368 ; 7 Vict., ch. XXII, s. 5, 6, 7 ; 4 Vict., ch. XXX, s. 10.

ne peut préjudicier à Larue, maintient la contestation de ce dernier, &c.

DUVAL, juge : La force majeure invoquée par sir H. J. Caldwell ne peut préjudicier à des tiers, dans l'état actuel de notre Législation. Larue qui a prêté avec bonne foi et enregistré son titre doit nécessairement primer Caldwell.

MEREDITH, juge : Et comme l'a prétendu le Conseil de Larue, Caldwell pouvait aisément faire suppléer à son titre qui avait été détruit. (3 *D. T. B. C.*, p. 42.)

G. O. STUART, pour Caldwell.

LELIÈVRE et ANGERS, pour Larue.

LEGS.—COMMUNAUTE DE BIENS.

BANC DE LA REINE, EN APPEL, Montréal, 12 octobre 1852.

Présents : SIR J. STUART, Bart., Juge en Chef, ROLLAND, PANET et AYLWIN, Juges.

ROY, Appelant, *et* GAGNON, Intimé.

Jugé : **Que les legs par le mari de la part de communauté afférante à sa femme, à la charge de payer certaine rente à cette dernière, est valable, si la femme accepte la rente imposée à tel legs. (1)**

Le 18 avril 1834, Joseph Roy fit son testament, devant notaires, par lequel il légua à son fils, l'Appelant en cette cause, plusieurs immeubles, dont l'un était pour partie conquêt de la communauté qui existait entre lui et Charlotte Dupuis, sa femme, à la charge par l'Appelant " de nourrir, loger, vêtir et " entretenir Charlotte Dupuis, sa mère, sa vie durante ; et aussi, " Marie Louise Roy, fille du testateur, et en cas de mésunion " entre eux, le dit Joseph Roy, fils (l'Appelant), sera tenu et " obligé de leur payer, bailler et livrer, chaque année, à cha- " cune d'elles, une rente annuelle et viagère, bien suffisante, et " qui sera fixée pour lors. par deux personnes, experts et gens " à ce connaissants, " à la charge encore par Joseph Roy, fils, de payer et livrer certaines autres sommes y mentionnées.

Jusqu'en 1837, le testament fut exécuté entre Charlotte Dupuis et l'Appelant, mais, à cette époque, des difficultés s'étant élevées entre eux, il firent un compromis, et nommèrent des arbitres pour prendre connaissance du testament, et établir la rente qu'aurait à payer l'Appelant à sa mère. Les arbitres firent leur rapport, que Charlotte Dupuis et l'Appelant acceptèrent. En juin 1847, Charlotte Dupuis poursuivit l'Appelant pour

(1) V. art. 1293 C. C.

£108 10s. 10d., pour arrérages de cette pension ainsi fixée. Elle obtint jugement pour partie de cette somme, et en fut payée.

Le 17 juin 1848, Charlotte Dupuis fit donation à l'Intimé, d'une perche et six pieds de front, sur 28 arpents de profondeur, étant moitié d'un conquêt de la communauté, formant partie d'un des immeubles légués à l'Appelant, tel que sus expliqué ; l'Intimé en ayant pris possession, l'Appelant se pourvut contre lui au pétitoire pour toute la terre en question, se fondant sur le legs à lui fait comme susdit.

A cette demande l'Intimé plaida 1° qu'il n'avait possédé qu'une perche et six pieds de front sur vingt-huit arpents de profondeur, suivant la donation que lui en avait faite Charlotte Dupuis ; 2° que cette étendue n'avait jamais été la propriété de Joseph Roy, le testateur, et n'avait pu passer à l'Appelant par le testament susdit, en autant qu'elle était la part afférante à Charlotte Dupuis dans un conquêt de la communauté qui avait existé entre elle et Joseph Roy, et avait été sa propriété depuis le décès de ce dernier, et dont elle avait toujours été en possession depuis lors.

Par ses réponses, l'Appelant allégua que l'Intimé ne pouvait opposer ce droit de communauté de Charlotte Dupuis, vu que, longtemps avant la donation faite à l'Intimé, elle avait approuvé, confirmé et exécuté le testament de Joseph Roy ; que ce testament n'était pas au préjudice de Charlotte Dupuis ; que la donation par elle à son gendre avait été faite dans l'intention de frauder l'Appelant ; que l'Intimé connaissait le testament, le compromis, le rapport d'arbitres et autres actes de ratification susdits, qu'il ne pouvait avoir plus de faveur que Charlotte Dupuis.

La majorité de la Cour Supérieure (DAY et C. MONDELET, juges, SMITH, juge, *dissentiente*) adjugea en faveur de l'Intimé :

" The court considering that Plaintiff, by virtue of the last " will and testament of the late Joseph Roy, in his declaration " set forth, did not acquire any right or title to more than one " undivided half of the immoveable property in said will and " also in said declaration described, and that, by law, the other " undivided half of the said property vested in, and belonged " to said Charlotte Dupuis, wife of said Joseph Roy, as *com-* " *mune en biens* with him, and that Plaintiff hath not alleged " or set forth by his declaration any right or title to said " undivided half, so belonging to said Charlotte Dupuis, by " him derived and had from her, nor any other sufficient legal " title to said last mentioned undivided half of said property, " nor hath he established, by evidence, any such right or title " thereunto ; and, further, considering that Defendant hath " established the material allegations of the exception by him

" in the said cause pleaded, doth maintain the said exception, " and dismiss Plaintiff's action."

DAY, juge, en prononçant le jugement de la cour: On ne peut juger qu'en adhérant aux principes sur la transmission des immeubles, on ne peut adjuger par inférence sur la volonté de transférer la propriété : Il y avait communauté, et le mari ne pouvait léguer plus que sa part en icelle. On ne peut vendre le bien d'autrui, et rien n'empêche le propriétaire de réclamer son bien. La question est de savoir si Charlotte Dupuis a fait quelqu'acte ratifiant l'aliénation dans le cas actuel. Le compromis ne roule que sur la rente, le testament lègue tout au Demandeur, à la charge d'une pension, sans dire néanmoins que la femme doive pour cela renoncer à ses droits ; on ne trouve rien de tel dans le testament. Elle était commune, elle l'a toujours été, elle n'a rien fait pour renoncer ; elle a été en possession pendant plus de dix ans, et le fait d'aliénation de partie des biens est une acceptation de la communauté. Il semble résulter de tout cela que c'était sa propriété, qu'elle n'y a pas renoncé, et que, par implication, on ne peut supposer un consentement de sa part à l'aliénation faite par le testateur. D'un autre côté, le Demandeur invoque dans sa déclaration un testament comme son titre de propriété, et par sa réponse il établit un droit de propriété tout à fait différent, un transport par Charlotte Dupuis résultant du compromis. Il est de principe que la réponse ne peut contenir aucun nouveau fait au soutien de la demande, mais seulement des moyens à l'encontre des exceptions, et qui en font voir le peu de fondement.

MONDELET, juge : Sur ce dernier point, je partage l'opinion du président de la cour, et, sur le premier point, je suis d'opinion que l'autorité de Bourjon vient au soutien du jugement, en établissant que le mari meurt comme associé. Il faut de plus que la volonté d'aliéner soit formelle, ce qui ne paraît pas dans la présente instance.

SMITH, juge : Je diffère sur les déductions à tirer des principes applicables au cas actuel. Le Demandeur réclame comme légataire de son père, le Défendeur invoque l'acquisition qu'il a faite de sa mère de l'héritage en question comme étant sa part d'un conquêt de la communauté. La loi est claire ; un testateur ne peut disposer de la totalité des biens de la communauté sans le consentement ou au détriment de la femme. Ici, d'après le testament, la femme est légataire d'une pension dont est grevé le Demandeur. Sous ce testament, comme il n'y a pas d'acceptation de communauté prouvée, et n'y ayant eu aucun partage, tous les biens restaient dans la succession du mari, sauf à la femme à exercer ses droits si elle était lésée. Ici, la femme par le compromis, a confirmé le

testament et accepté la rente ; par là, elle s'est soustraite aux obligations de la communauté et a abandonné son droit. La véritable interprétation qu'on doive donner à l'art. 296 de la coutume, c'est que la disposition est nulle si la femme accepte la communauté ; mais lorsqu'elle confirme l'aliénation des biens de la communauté, en acceptant et confirmant le testament, il y a renonciation à la communauté suivant la doctrine de Bourjon, surtout s'il n'y a pas eu partage.

Sur l'appel de ce jugement, l'Appelant s'efforça de maintenir que la prohibition de disposer par testament des biens de la communauté n'est pas absolue ; que telle disposition vaut si elle n'est pas contestée par la femme, et qu'il n'en peut résulter qu'une nullité relative (1).

CHERRIER, C. S., Conseil pour l'Appelant soutient que le statut de la 41e Geo,III, ne fait que confirmer l'ancienne jurisprudence ; que le legs est valable s'il ne préjudicie pas à la femme, et si elle peut trouver à se payer sur les autres biens. Telle est la jurisprudence sous les nouvelles lois de France où le legs de la chose d'autrui est prohibé. (2)

L'Intimé au soutien de sa cause cite les autorités en note. (3)

LA FONTAINE, L. H., Conseil de l'Intimé, s'attache à démontrer que le seul titre qui pût soutenir la prétention de l'Appelant serait la renonciation par la femme, qui n'est pas invoquée dans la déclaration, mais seulement dans les réponses ; que le

(1) Art. 296 de la Coutume ; Ferrière sur l'art. 225 de la Coutume de Paris, Ed. in-12° ; 2 Bourjon, édit. 1747, p. 247, 3e part. des testaments, ch. 1, n° 13 ; Anc. Dénizart, *vbo* nullité, p. 469, n° 10 ; Guyot, *Répert.*, vbo *nullité*, pp. 250, 251, § 3, 253-4 ; 1 Domat, édit. folio, p. 446, liv. 3, testaments inofficieux, sect. 3, pp. 1, 4 ; 2 Bourjon, p. 253, nos 37-38 ; Merlin, *Répert.*, vbo *renonciation*, p. 3 ; 2 Furgole, *des Testaments*, p. 27 ; Lemerle, fins de non-recevoir, pp. 72, 84, 73, ch. v ; 1 *R. J. R. Q.*, p. 75, Forbes and Atkinson, sur réponses spéciales.

(2) 2 Troplong, *Contrat de mariage*, p. 190, n° 912 ; Odier, *Contrat de mariage*, p. 220, n° 229 ; 3 Ferrière, *Grand Cout.*, p. 425 ; Brodeau sur Louet, L. tit. 2, sommaire 6 ; Domat, liv. 3, Testaments, tit. 2, sec. 3, Art. 3 ; Lebrun, *Communauté* liv. 2, ch. II, s. 1 ; Ricard, p. 796 ; n° 1557 ; Pothier, *Communauté*, n° 475 ; *Quesnel* vs. *Bradford*, jugt. 11 février 1833.

(3) 4 Ferrière, *G. Coutumier*, art. 296, p. 262, nos 2, 3, 4, 7 et 8 ; 1 Bourjon, *Communauté*, 4e partie, sect 3, art. 15, p. 493 et art. 21 ; Lebrun, *Communauté*, liv. 2, ch. II, sect. 1, n° 1, p. 202 ; Duplessis, *Communauté*, liv. 1, ch. III, pp. 377-8-9 ; 2 Furgole, *des Testaments*, p. 27, nos 30, 31, p. 33, n° 47, p. 59, n° 86 ; Pothier, *Communauté*, n° 475 ; 5 Toullier, nos 515, 516, 520 ; 12 Toullier, nos 314, 315, 316 ; Guyot, *Répert.*, vbo communauté, p. 211 ; Pothier, *Donations testamentaires*, p. 495, n° 50 ; Merlin, *Répert.*, vbo communauté, p. 188, art. 4. sect. 5 ; Merlin, *Répert.*, vbo conquêt, sect. 4 ; Ferrière, sur la coutume de Paris, éd. in-12°, pp. 28, 29, p. 276, art. 296 ; Renusson, édit. in-4°, Communauté, p. 86, part. 1, ch. VI, nos 7, 17, 18, 19 ; 1 Dictionnaire de droit, *vbo* cause en fait de legs ; Rogron, *Codes expliqués*, art. 1423 ; Cubain, *Droits des femmes*, nos 297, 298, 299 ; Merlin, *Répert.*, vbo renonciation, p. 568, art. 3, nos 1 et 2 ; 1 Arrêts d'Augeard, pp. 513, 518 ; 13 Toullier, n° 142.

testateur ne paraît pas avoir eu l'intention de disposer de la part afférante à sa femme ; que le conjoint qui dispose d'un conquêt, sachant qu'il ne lui appartient pas pour le tout, est censé n'avoir disposé que de sa part ; qu'il n'y a pas d'approbation expresse du testament, ni renonciation expresse à la communauté. (1)

SIR JAMES STUART, Bart., J. en C. : Deux questions s'élèvent en cette cause ; la première, le mari peut-il léguer la totalité des biens de la communauté, et la seconde, y a-t-il eu ratification par la femme de manière à valider le legs dont il s'agit ici ? Sur le premier point, il n'y a aucun doute que le mari ne le peut sans le consentement de la femme. Quant au second point, suivant le droit anglais, comme sous le droit français, il est de principe que la ratification rend l'acte valable *ab initio.* Il n'y a donc qu'une question de preuve à régler. On ne peut trouver une cause où la ratification soit plus évidente. Il s'agit ici du legs de deux propres et d'un conquêt, à la charge d'une pension en faveur de la femme, elle ne pouvait accepter la condition sans consentir au legs et l'approuver. Il est prouvé qu'elle a accepté la condition et la pension, il n'en fallait pas plus. Mais il y a plus, c'est que, sur difficulté, il y a eu compromis dont le langage est formel. Nul doute conséquemment que la femme n'ait ratifié le legs qui se trouve validé par là dans son origine.

ROLLAND, juge, *dissentiente* : Je considère que la cause présente plusieurs questions. Le mari cesse d'être maître en cessant d'exister, ainsi le veut l'article de la Coutume, quoique Ferrière et Troplong soient d'une autre opinion. L'action pétitoire de l'Appelant se trouve sans titre. C'était son père qui avait le titre, mais sujet à la communauté, et c'est le Défendeur qui tient le titre de la propriété en question de sa mère, vraie propriétaire à raison de son droit de communauté, droit qui ne peut être censé abandonné, si cet abandon n'est constaté par écrit. *Vide* Proudhon, *Propriété.* Mais elle a fait, dit-on, quelque chose qui équivaut à un abandon. Je ne vois rien de tel dans la procédure. Elle est toujours restée en possession de la propriété, et je ne pense pas qu'une déclaration indirecte dans un compromis qui y est étranger puisse faire présumer un abandon de ses droits : *Nemo facilè presumitur donare.* La renonciation est de tous les actes le plus difficile à prouver ; on ne la présume pas. Et ici on ne l'a pas prouvée par un acte formel ; j'aurais maintenu le jugement de la Cour Inférieure.

" The court, considering that Marie Charlotte Dupuis, widow of the late Joseph Roy, could not avail herself of that part of the last will and testament of said Joseph Roy, which could

(3) Bornier, *Preuve*, 248.

be advantageous to her, and, at the same time, repudiate that part of it which was disadvantageous to her, but was bound to accept said will or repudiate it in its entirety : *qui sentit commodum, sentire debet et onus ;* and, considering also, that said Marie Charlotte Dupuis, after the death of Joseph Roy, by accepting the condition in her favor annexed to the several special devises of land to Appellant, in said will of Joseph Roy contained, and, by requiring and receiving the execution and benefit of said condition, and, also, in express terms of approbation, and acquiescence in said will, contained in the submission to arbitration or *compromis* of record in this cause, followed by the demand and receipt of a life rent or *rente viagère* from Appellant, under and in pursuance of said condition, approved, ratified and confirmed said will, and was thereby stopped from contesting said will, and, particularly, from contesting the devise of that portion of the lot of land thereby devised, and in question in this cause, which was included and made part of the *communauté de biens* between Joseph Roy and Marie Charlotte Dupuis ; and, considering also, that Marie Charlotte Dupuis, before and at the time of the making of the deed of gift in the preremptory exceptions of Respondent mentioned, had ceased to be the owner of any part of the lot of land devised, and in question in this cause, as aforesaid, or to have any right or interest in the same, and that Respondent by reason of said deed acquired no right of property to or in any part of said lot of land ; and, considering, therefore, that there is errror in the rendering of the judgment of the court below. It is adjudged that the judgment appealed from, be and the same is hereby reversed, annulled and made void. And proceeding to render the judgment which the court below ought to have rendered " etc, etc. Judgment as in a petitory action (3 *D. T. B. C.*, p. 45.)

MACKAY & AUSTIN, Procureurs de l'Appelant.
CHERRIER, C. S., Conseil.
HUBERT, Procureur de l'Intimé.
LA FONTAINE, L. H., Conseil.

APPEL.—EXCEPTION A LA FORME.

BANC DE LA REINE, En APPEL, Québec, 17 janvier 1853.

Présents : ROLLAND, PANET, et AYLWIN, Juges.

MOREAU (Défenderesse), Appelante, et MOTZ (Demandeur), Intimé.

Jugé : Qu'une partie n'obtiendra pas un appel d'un jugement interlocutoire rejetant une exception à la forme, parce qu'elle a été filée trop tard,

si les moyens plaidés par l'exception à la forme pouvaient l'être par la défense en droit filée en la même cause, et si copie de cette défense en droit n'est pas produite, sur le principe que la Cour d'Appel ne peut pas dire que le grief soit irrémédiable et définitif, n'ayant pas devant elle la défense en droit. (1)

L'Appelante obtint un mois de délai pour produire ses défenses, et, à l'expiration de ce délai, plaida une exception à la forme, une défense en droit, une exception perpétuelle, et une défense en fait. Le Demandeur demanda de suite le rejet de cette exception à la forme, aussi bien que la défense en droit, sur le principe qu'elles avaient été produites trop tard, et que la Défenderesse, ayant demandé du délai pour se défendre, devait fournir des plaidoyers au mérite, et non des exceptions à la forme, et ne pouvait pas raisonnablement prétendre d'un côté que la demande était insuffisante, et de l'autre répondre à cette demande. Le Demandeur prétendait que, dans pareil cas, le délai accordé à une partie n'est pas pour lui fournir l'occasion de découvrir des nullités dans l'exploit d'assignation, mais pour lui donner le temps de préparer ses réponses et ses moyens de preuve à l'encontre de la demande même. D'après les règles de procédure, le plaidoyer, en pareil cas, doit être un plaidoyer au mérite, *an issuable plea*. La Défenderesse, de son côté, prétendait que l'acte de judicature, (2) avait changé la règle à cet égard ; elle se reposait sur la 26e section, qui est comme suit : " Le délai pour plaider pourra, dans tous les cas, être prolongé par l'ordre de la Cour Supérieure, ou d'un des juges de cette cour, sur demande spéciale dont avis devra être donné à la partie adverse, au moins un jour plein avant qu'elle soit présentée ; et toute partie pourra produire un plaidoyer (ANY PLEADING), avant l'expiration du délai accordé par le présent acte pour sa production."

La Cour Supérieure, composée de BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges, avait adopté les prétentions du Demandeur (MEREDITH, *dissentiente*), et débouté l'exception à la forme. Elle avait jugé qu'en pareil cas la Défenderesse devait fournir un plaidoyer au mérite, et était forclose du droit de plaider des moyens de nullités : MEREDITH, Juge, était d'avis que la 26e Section de l'Acte de Judicature permettait, même dans ce cas, de produire *toute espèce* de défense, *any pleading*, et conséquemment une exception à la forme. De ce jugement, la Dame Moreau demandait qu'il lui fût permis d'appeler, et avait produit, à l'appui de sa demande, la déclaration du Demandeur, la motion pour délai pour plaider, l'ex-

(1) V. art. 15, 116, 147 et 1116, C. P.C.

(2) 12 Vict. ch. XXXVIII.

ception à la *forme*, la motion pour rejeter cette exception à la forme, et le jugement déboutant l'exception. L'Intimé prétendit qu'un jugement déboutant une exception à la forme, pourrait bien, dans certain cas, être appelable, aux termes de la 25e Geo. III, ch. II, sec. 24, si ce jugement avait causé à la partie un préjudice irremédiable ; mais il ne suffisait pas de dire qu'une exception à la forme avait été déboutée, pour obtenir un appel, *de plano*. La pratique exigeait une copie du dossier, afin que la Cour d'Appel pût voir si le jugement impugné avait vraiment causé un tort irrémédiable à la partie. Dans le cas actuel, l'Appelante se plaignait qu'il y avait cumul d'actions dans la déclaration du Demandeur,parce qu'il demandait en même temps un inventaire, une reddition de compte, un partage, la rescision de divers actes (*entachés de nullité absolue*), et le paiement d'un don gratuit fait par des conjoints à leurs enfants. De prime abord, cette prétention n'était nullement fondée. (1) Quant à la rescision de certains actes demandée par l'action, le Demandeur avait anticipé la défense, en demandant que la Cour déclarât nuls de plein droit, des inventaires faits sans légitimes contradicteurs, et des redditions de comptes faites sans production de pièces justificatives. D'ailleurs, ces moyens devaient se plaider par une défense en droit, et non par une exception à la forme, et peut-être se trouvaient-ils dans la défense en droit dont la Cour Inférieure n'avait pas encore disposé. Rien de décisif n'avait été jugé contre l'Appelante, rien qui ne pût être encore remédié par le jugement final. Ce n'était donc qu'un simple jugement d'instruction. L'Appelante prétendait que son exception à la forme était bien fondée, et que, s'il lui était permis d'être jamais entendue sur la valeur des moyens de nullité y contenus, elle obtiendrait de faire certainement débouter l'action du Demandeur. Le jugement de la Cour Supérieure l'avait privée de cet avantage, et c'est en quoi ce jugement était définitif, irrémédiable et sujet à Appel.

ROLLAND, juge : Je considère ce jugement comme un simple jugement d'instruction, que la 25e Geo. III, ch. II, n'a jamais eu en contemplation de rendre appelable, c'est pourquoi je suis d'avis de refuser l'Appel.

AYLWIN, juge : Je suis bien d'opinion qu'un jugement déboutant ou rejetant une exception à la forme peut être appelable ; mais, dans le cas actuel, le dossier produit est incomplet : nous n'avons pas copie de la défense en droit et des autres plaidoyers, et sans dire que le cumul d'actions dont on se plaint ne pouvait pas être le sujet d'une exception à la forme, ce moyen pouvait être plaidé par une défense en droit, et peut

(1) 2 Pigeau, *Traité de Procédure civile*, p. 31, note *b*.

se trouver dans la défense en droit,qui n'est pas devant nous ; en sorte que nous ne pouvons pas dire que le jugement, rejetant l'exception à la forme, a causé à la partie un tort irrémédiable, puisqu'elle peut encore faire valoir ce moyen s'il se trouve dans sa défense en droit. PANET, juge, partage cette dernière opinion. L'Appel est refusé. (3 *D. T. B. C.*, p. 53.)

GAUTHIER ET LEMIEUX, pour l'Appelante. ; LELIEVRE et ANGERS, pour l'Intimé.

TUTELLE.—INVENTAIRE.—FRAUDE.—MINEUR.—TRANSACTION.—ACTION RESCISOIRE.—PRESCRIPTION.—PREUVE.

COUR SUPÉRIEURE, Québec, 5 septembre 1855.

Présents : BOWEN, Juge en chef, MORIN et BADGLEY, Juges.

MOTZ *vs* MOREAU, ès qualités.

Jugé :—1° Que tant qu'une première tutelle existe, une seconde ne peut avoir lieu, et que tous les actes faits par un second tuteur sont nuls ; (1)

2° Qu'un inventaire fait sans y appeler le premier tuteur est nul ; (2)

3° Que si le subrogé tuteur qui a comparu à tel inventaire, est encore mineur, l'inventaire est nul ;

4° Que l'huissier qui a prisé les effets portés à l'inventaire, doit être assermenté, à peine de nullité de l'inventaire ;

5° Que des inexactitudes, de fausses évaluations, des recels dans un inventaire, le rendent nul, et constituent en fraude celui qui l'a fait ;

6° Que toutes transactions, quittances et décharges intervenues entre tel tuteur et des mineurs devenus majeurs, ayant pour base tel inventaire incorrect et frauduleux, sont nulles de plein droit ;

7° Que des transactions intervenues entre un tuteur et des mineurs devenus majeurs, sans qu'il ait été fait un bon et loyal inventaire, sans reddition de comptes et sans production de pièces justificatives, sont nulles de plein droit ;

8° Que d'action rescisoire, dans pareil cas, ne se prescrit pas par dix ans, lorsqu'il y a dol et fraude ; (3)

9° Qu'en l'absence de registres, l'état civil d'une personne peut être prouvé par les dires de ses parents et par témoins.

L'action du Demandeur avait pour objet de réclamer sa part dans la succession de feue Christiana McPhee, sa mère, tant de son chef que du chef de William Andrew Motz, son frère, et Catherine Motz, sa sœur, dont les droits lui avaient été cédés. Cette action était dirigée contre Henriette Moreau, veuve Joseph Carrier, poursuivie en son propre nom, et en qualité de tutrice à ses enfants, comme étant en possession

(1) V. Art. 246 C. C.

(2) V. Art. 1324 C. C.

(3) V. Art. 2258 C. C.

des biens réclamés, à l'effet de lui faire rendre compte, de la forcer à procéder à faire inventaire, et, de plus, à l'effet d'opérer un partage et licitation. L'action avait aussi pour objet de demander l'annulation de plusieurs actes que le Demandeur anticipait devoir lui être opposés, entre autres un inventaire, diverses cessions, quittances et transactions intervenues entre les héritiers Motz et feu Joseph Carrier, leur beau-père.

Voici les principaux allégués de la demande : Le Demandeur allègue, dans sa déclaration, que la Défenderesse, Henriette Moreau, était commune en biens avec Joseph Carrier, qu'elle est sa légataire usufruitière, et tutrice des enfants mineurs issus de son mariage avec lui et tutrice à la substitution créée par le testament de son mari, et c'est, en ces diverses qualités, qu'il dirige son action contre elle. Il met en cause Joseph Carrier, médecin, de Québec, comme ayant un intérêt dans les biens en contestation. Il allègue que, du marriage de John Motz et Christiana McPhee, sont nés trois enfants, savoir : lui, James Motz, le Demandeur, William Andrew Motz, et Catherine Motz ; que John Motz, son père, est décédé, à Québec, le 1er octobre 1819 ; que par son testament du 12 juillet 1814 (Scott, notaire), John Motz a institué Christiana McPhee, son épouse, sa légataire universelle ; que le 7 décembre 1819, Christiana McPhee a épousé en secondes noces Joseph Carrier, que de ce dernier mariage, est né Joseph Carrier, fils, mis en cause comme susdit ; que Christiana McPhee est décédée le 14 avril 1829 ; que par son testament, en date du 24 décembre 1828 (Panet, notaire), Christiana McPhee, donna l'usufruit de ses biens, meubles et immeubles, à Joseph Carrier, son époux, sa vie durant, et en légua la propriété, par portions égales, un cinquième à Joseph Carrier, son époux, un cinquième à Joseph Carrier, son fils, un cinquième à James Motz, un cinquième à William Andrew Motz et un cinquième à Catherine Motz ; que, lors du décès de Christiana McPhee, Joseph Carrier, son époux, s'est mis en possession de tous les biens laissés par elle ; que la succession de Christiana McPhee valait, en mobilier, 10,000 livres courant, et en immeubles, une autre somme de 10,000 livres ; que le 6 décembre 1837, Catherine Motz est décédée, *ab intestat*, laissant pour héritiers et représentants, ses frères, James et William Andrew Motz ; que, par acte fait à Buffalo, le 8 mars 1852, William Andrew Motz a transporté au Demandeur, James Motz, ses droits dans la succession de John Motz, son père, de Christiana McPhee, sa mère, et de Catherine Motz, sa sœur, avec, en outre, la somme de £200, assurée au dit William Andrew Motz par un don gratuit consenti par Christiana McPhee, sa mère, et le dit feu Joseph Carrier, le 17 juillet, 1820 (Scott, notaire) ; que cet acte de transport a été déposé au greffe de Petitclerc, notaire, le 24 avril 1852, accepté par

le Demandeur, le 21 mai 1852, et signifié à la Défenderesse le même jour ; que Joseph Carrier n'a jamais fait faire un bon et loyal inventaire des biens dépendants de la succession de Christiana McPhee, et n'en a jamais rendu compte aux mineurs Motz ; que, le 23 septembre 1823 Joseph Carrier et Christiana McPhee firent nommer Lewis Harper tuteur, et John Kerry subrogé tuteur aux mineurs Motz ; que, le 21 août, 1830 Joseph Carrier se fit nommer tuteur au dit William Andrew Motz et à Catherine Motz, sans avoir au préalable fait destituer de sa tutelle Lewis Harper, rlors résidant à Québec, et en possession de son dit office de tuteur, et fit nommer comme subrogé tuteur le Demandeur, James Motz, alors encore mineur ; que cette élection de tuteur fut obtenue par dol et fraude, et dans le dessein d'accaparer les biens des mineurs Motz ; que Joseph Carrier, en sa qualité de tuteur des mineurs Motz, s'est immiscé dans l'administration de leurs biens, et ne leur en a jamais rendu compte, mais leur a fait signer divers actes de règlements et transactions, ayant pour objet de les dépouiller de leurs biens, desquels actes le Demandeur requiert l'annulation ; que, le 27 avril 1831, devont Panet, notaire, James Motz, Demandeur, fit cession au dit Joseph Carrier, son beau-père, de tous ses droits mobiliers et immobiliers dans les successions de feu John Motz, et de feue Christiana McPhee, ses père et mère, à la charge par Joseph Carrier de payer les dettes des dites successions ; que ce transport fut fait pour la somme de £505. 6s 3 4/5d., que le Demandeur reconnut avoir reçue du dit Joseph Carrier ; que cet acte de cession est nul, parce qu'il y a lésion de plus d'outre moitié dans le prix des immeubles cédés ; parce que Joseph Carrier n'avait jamais rendu compte au dit James Motz, et ne pouvait transiger avec lui légalement ; parce que le prix de cette transaction était basé sur des calculs faux et erronés, entre un tuteur et son pupille, sans reddition de compte, sans production de pièces justificatives et sans inventaire : c'est pourquoi il demande l'annulation de cet acte.

Le dit Demandeur allègue de plus, qu'un pareil acte de transport a été consenti, le 7 décembre 1833 (Panet, notaire), par par son frère William Andrew Motz au dit Joseph Carrier, aux mêmes termes et conditions, et, comme cessionnaire de son frère, il demande l'annulation de cet acte pour les causes ci-dessus énumérées.

Le Demandeur offre, par sa déclaration, de tenir compte des sommes reçues par lui et son frère.

Le Demandeur allègue de plus, que, par acte devant Panet, notaire, en date du 4 juillet 1839, Joseph Carrier dressa un compte de ce qu'il devait à la succession de Catherine Motz, décédée depuis peu, duquel compte le Demandeur demande l'an-

nulation, parce qu'il est informe, illégal et incorrect, et n'a pas été accompagné de pièces justificatives.

Le Demandeur demande de plus l'annulation d'un acte d'acceptation de ce compte par son frère William Andrew Motz, en date du 4 juillet 1839, devant Panet, notaire.

Le Demandeur allègue, de plus, la passation d'un acte de règlement et arrêté de tous comptes, en date du 30 avril 1841, devant Panet, notaire, entre le Demandeur et Joseph Carrier, contenant une acceptation de la reddition de compte de la succession de Catherine Motz, et une quittance : de cet acte le Demandeur, pour les mêmes raisons, demande également l'annulation.

Le Demandeur allègue aussi que Joseph Carrier, dans la vue de frauder les mineurs Motz, leur a tenu caché un certain acte de don gratuit en leur faveur, en date du 17 juillet 1820.

Il allègue encore que, le 31 août 1830, devant Panet, notaire, Joseph Carrier, tant en son propre nom comme commun en biens avec Christiana McPhee, que comme son légataire en usufruit et en propriété, pour un cinquième, que comme tuteur à Joseph Carrier, son fils mineur, issu de son mariage avec Christiana McPhee, et à William Andrew Motz, et Catherine Motz, susnommés, légataires en propriété, chacun pour un cinquième, dans la succession de leur mère, en présence du Demandeur, aussi légataire pour un cinquiéme, dans la succession de sa mère, et subrogé tuteur des dits William Andrew Motz, et Catherine Motz, fit procéder à l'inventaire de tous les biens dépendants de la communauté de biens qui avait existé entre lui, Joseph Carrier, et Christiana McPhee ; que cet inventaire est nul, parce qu'il n'a pas été fait en présence de Lewis Harper susnommé, tuteur des mineurs Motz, et seul légitime contradicteur ; parce que la qualité de tuteur prise par Joseph Carrier, était une qualité usurpée ; par que le Demandeur agissant comme subrogé tuteur, ne l'était pas de fait, et avait été induit en erreur à cet égard par Joseph Carrier, parce que le Demandeur était alors mineur, et sous la puissance de Joseph Carrier ; parce que cet inventaire est incomplet, et faux ; parce que, dans icelui, Joseph Carrier a énuméré, comme faisant partie de la communauté, des propres et des acquêts de Christiana McPhee, et n'a pas tenu compte à la succession de Christiana McPhee, de plusieurs propres et acquêts, aliénés par lui durant la communauté ; pourquoi le dit Demandeur demande que le dit inventaire soit déclaré nul.

Le Demandeur allègue de plus, que, durant la communauté qui a existé entre Joseph Carrier et Christiana McPhee, Joseph Carrier a vendu divers immeubles, propres et des acquêts de Christiana McPhee, et en a perçu le prix, en sorte que la communauté en est redevable envers la succession de cette dernière,

par forme de remploi de propres et acquêts aliénés, et ce au montant de la valeur d'iceux, savoir : de la somme de quatre mille livres courant.

Le dit Demandeur allègue, de plus, que Joseph Carrier n'a jamais fait faire, comme ci-dessus dit, un bon et loyal inventaire des biens dépendant de la communauté entre lui et Christiana McPhee, en sorte que la communauté a été continuée, et que, partant, les héritiers de Christiana McPhee, ont droit de demander, en vertu de la continuation de la communauté, la moitié des biens délaissés par Joseph Carrier.

Le dit Demandeur allègue, de plus, que par acte fait à Québec, devant Scott, notaire, le 17 juillet 1820, Christiana McPhee et Joseph Carrier firent un don gratuit de 200 livres courant à chacun des mineurs Motz, payable à leur âge de majorité, le dit don accepté par leur mère ; que par la loi le dit don gratuit est valable pour moitié, savoir : pour la moitié provenant de de Christiana McPhee ; que la moitié du dit don gratuit, savoir, 300 livres courant, appartient au Demandeur, savoir, pour un tiers de son chef, pour un sixième comme héritier de Catherine Motz, pour un tiers, plus un sixième, comme cessionnaire de William Andrew Motz, en vertu du transport ci-dessus mentionné, et aussi en vertu d'un transport spécial à lui fait, pour valeur reçue, par William Andrew Motz, le 19 septembre 1844, avec intérêt légal, depuis leur âge de majorité respectivement, laquelle somme est encore due au Demandeur, et forme partie des droits et réclamations du Demandeur; que le 3 octobre 1831, Joseph Carrier a épousé en secondes noces Henriette Moreau ; que, le 2 septembre 1851, Joseph Carrier est décédé à Québec ; que, par son testament, reçu devant Panet, notaire, le 21 juin 1851, Joseph Carrier légua tous ses biens en usufruit à Henriette Moreau, sa vie durant, et en propriété à ses enfants, issus de son second mariage, avec substitution ; que Henriette Moreau le 17 octobre 1851, a été nommée tutrice à ses enfants mineurs ; que le 14 juin 1852, elle a été nommée tutrice à la substitution créée par le testament de Joseph Carrier ; que Joseph Carrier, comme susdit, et les Défendeurs en cette cause, tant en leurs propres et privés noms, qu'en leurs qualités respectives, et aussi comme étant aux droits de Joseph Carrier, ont appréhendé toute la succession de Christiana McPhee, l'ont administrée et gérée, sans faire d'inventaire, ont joui et jouissent encore de tous les biens, meubles et immeubles, dépendant de la succession de Christiana McPhee, mère du Demandeur, et que, quoique de ce souvent requis, ils ont toujours refusé et refusent encore d'en faire faire inventaire, de rendre compte, de procéder au partage de la succession de Christiana McPhee, et de payer au Demandeur ce qui lui est dû, comme susdit ; au dommage pour le Demandeur, intéressé dans la succession de Christiana McPhee, pour trois,

cinquièmes de la somme de 24,000 livres courant, et comme donataire au montant de 300 livres courant.

Les conclusions de cette déclaration sont que, par le jugement de la cour, il soit dit et déclaré : 1° que le dit acte de transport par le Demandeur au dit Joseph Carrier, passé devant Panet et son confrère, notaires, à Québec, le 27 avril 1831 soit rescindé et annulé ; 2° que le dit acte de transport par William Andrew Motz au dit Joseph Carrier, passé devant Panet et son confrère, notaires, à Québec, le 7 décembre 1833, soit aussi rescindé et annulé ; 3° que le compte abrégé des biens mobiliers et immobiliers de la succession de Catherine Motz, rendu par Joseph Carrier au dit William Andrew Motz, passé devant Panet et son confrère, notaires, le 4 juillet 1839, ainsi que l'acceptation ou ratification d'icelui, par acte, en date du même jour, devant les mêmes notaires, soient déclarés insuffisants, informes, incomplets et illégaux, et soient en conséquence rescindés et annulés ; 4° que l'acte de règlement et arrêté de tous comptes que le Demandeur et Joseph Carrier ont eu ensemble, par acte passé devant Panet et son confrère, notaires, à Québec, le 30 avril 1841, soit aussi rescindé et annulé ; 5° que le prétendu inventaire de tous les biens dépendants de la communauté qui a existé entre Joseph Carrier et Christiana McPhee, par acte passé par devant Panet et son confrère, notaires, à Québec, le 31 août 1830, et les jours suivants, soit rescindé et annulé ; en outre, qu'il soit dit et déclaré que la communauté de biens qui a existé entre Joseph Carrier et Christiana McPhee, a été continuée et continue encore entre les représentants légaux de Joseph Carrier, les Défendeurs en cette cause, et le Demandeur comme seul représentant, en vertu des actes ci-dessus cités, de Christiana McPhee, sa mère ; et qu'en conséquence, par le dit jugement les Défendeurs, ès-qualités, soient adjugés et condamnés, dans tel court délai qu'il plaira à cette cour ordonner, par-devant tel notaire dont les parties conviendront, sinon nommés d'office, en présence des parties, et même en leur absence, après avis à elles donné, à procéder à l'inventaire de tous biens, meubles et immeubles, dependant de la succession de Christiana McPhee, et ensuite à rendre compte fidèle et sous serment au Demandeur de la gestion et administration, tant par Joseph Carrier, que par eux, les Défendeurs, des dits biens, meubles et immeubles, le tout à l'amiable si faire se peut ; sinon en justice, et à défaut par les Défendeurs de rendre le dit compte sous tel court délai qu'il plaira à cette cour fixer, se voir les Défendeurs, ès-qualités, condamnés purement et simplement à payer au Demandeur la somme de 24,300 livres, cours actuel, pour tenir lieu au Demandeur du reliquat du dit compte, et ce en vertu de la sentence à intervenir, sans qu'il en soit besoin d'autre, le reliquat duquel compte, s'il est actif,

sera porté en l'actif dans la masse du partage, et en extinction sur l'actif, s'il est passif, pour la dite succession. Et en outre, pour voir dire, qu'immédiatement après la clôture du compte et fixation du reliquat d'icelui, il sera, à la diligence du Demandeur, procédé, à l'amiable, si faire se peut, sinon en justice, au partage et liquidation des biens et effets de la succession de Christiana McPhee, à l'effet de quoi les immeubles seront tous visités et estimés, par experts convenus, ou nommés d'office, lesquels rapporteront l'état, valeur et consistance d'iceux, s'ils peuvent commodément se partager, en portions égales, aux droits de chacune des parties, et à cette fin il sera procédé : 1° sur les rapports qui seront faits par les parties de ce qu'elles peuvent avoir reçu en avancement, sujet à rapport ; 2° sur le dit inventaire et les pièces qui peuvent y être mentionnées ; 3° sur le partage de la communauté pour les biens qui écherront à la succession de Christiana McPhee ; 4° et enfin, sur le rapport des experts touchant les biens propres et acquêts à la dite succession, et non compris au partage de la communauté ; pour, après la composition de masse, être, les dits biens, divisés en portions égales, aux droits de chaque partie, de manière toutefois que les immeubles soient partagés par égales portions, sinon avec soulte, lors desquels rapports et partages, les parties assistées de leurs procureurs pourront faire tels dires, requisitions et observations qu'elles jugeront convenables, et, dans le cas où les experts estimeraient que les immeubles, ou quelques-uns d'eux, ne peuvent se partager en portions égales à leurs droits, voir dire qu'il sera procédé, par licitation, devant cette cour, au plus offrant et dernier enchérisseur, en la manière accoutumée, sur l'enchère qui sera à cette fin mise au greffe, lue et publiée en jugement, affichée à la huitaine, mise et apposée aux lieux et endroits nécessaires et accoutumés, et autres avertissements publics et ordinaires, pour, après la dite adjudication, être le prix d'icelle partagé comme il conviendra entre les parties ; et, pour, en outre, les Défendeurs, ès-qualités répondre et procéder, comme de raison, avec dépens, desquels, en tout événement, le Demandeur sera remboursé, comme de frais d'inventaire, de comptes, partage et licitation. Et soient les Défendeurs, en outre, condamnés à payer au Demandeur la somme de 300 livres courant, en vertu du don gratuit ci-dessus mentionné, avec intérêt.

A cette action la Défenderesse plaida d'abord par une exception à la forme, qui fut rejetée, parce qu'elle avait été produite trop tard ; l'action ayant été rapportée le 10 juillet 1852, et l'exception filée le 17 septembre de la même année. Dans cette exception, l'on reprochait au Demandeur d'avoir joint ensemble une action en reddition de compte et une action rescisoire, et aussi une action de dette pour ce qui concernait le don gra-

tuit; à quoi le Demandeur répondait que, prévoyant qu'on pouvait lui opposer l'inventaire et les autres documents illégaux, que, par fraude, Carrier lui avait fait signer, il pouvait en demander la rescision, ainsi qu'il aurait pu le faire par une réplique spéciale; et que, quant à la demande d'une condamnation pour partie du don gratuit cela n'était pas non plus étranger à la reddition de compte, puisque cette somme devait être défalquée de la succession de la dame Christiana McPhee, avant la reddition de compte.

Subséquemment la Cour d'appel refusa de permettre qu'on interjetât appel du jugement déboutant cette exception à la forme. (1)

La Défenderesse plaida, en outre, par une défense en fait, par une défense en droit, et par une exception.

Les moyens de droit sont comme suit : " Parce que le Demandeur ne peut demander ni obtenir la rescision de actes et " contrats mentionnés dans la déclaration, sans offrir au préa- " lable de remettre, rembourser et payer à la Défenderesse les " différentes sommes d'argent que le Demandeur allègue par sa " déclaration avoir reçues, lui, le Demandeur, et ceux qu'il re- " présente, et aux droits desquels il prétend être, et qu'il allè- " gue avoir été payées en vertu des dits actes, dont il demande " la rescision; parce qu'il n'est pas allégué dans la déclaration " que le Demandeur soit dans les dix ans, à compter de la ma- " jorité du Demandeur, et de ceux qu'il représente jusqu'à " l'institution de la présente action, pour avoir droit de deman- " der une reddition de compte; parce que le Demandeur n'al- " lègue pas qu'il soit dans les dix ans, à compter du jour de la " passation des actes et contrats dont il demande la rescision, " jusqu'au jour de l'institution de la présente action; parce " qu'il appert que, lors de l'institution de la présente action, il " y avait plus de dix ans que le Demandeur et ceux qu'il repré- " sente, étaient majeurs; parce qu'il appert que, lors de l'insti- " tution de la présente action, il y avait plus de dix ans que " les dits actes et contrats, avaient été passés. "

Les moyens invoqués dans l'exception sont comme suit: parce qu'il y a plus de dix ans entre âgés et non privilégiés que les différents actes et contrats dont le Demandeur demande la rescision, ont été passés, et que, partant, il n'est pas recevable à en demander la rescision, et que, lors de la passation des dits actes, le Demandeur et ceux aux droits desquels il prétend être, étaient majeurs; parce que, lors de l'institution de la présente action, il y avait plus de dix ans que le Demandeur et ceux qu'il représente, étaient devenus majeurs, et que, partant, le Demandeur n'est pas recevable à demander la res-

(1) Ce jugement est rapporté supra p. 344.

cision des dits actes ; parce que l'acte passé à Québec, devant Scott et son confrère, notaires, le 17 juillet 1820, et mentionné dans la déclaration comme étant un don gratuit par Christiana McPhee et Joseph Carrier, de la somme de 200 livres à chacun des mineurs Motz, et en vertu duquel le Demandeur réclame une somme de 300 livres, a été déclaré nul par un jugement rendu par la Cour du Banc de la Reine, pour le district de Québec, au terme supérieur, le 20 novembre 1845, dans une cause où le Demandeur était Demandeur, et Joseph Carrier, époux de la Défenderesse, était Défendeur, et que, partant, il y a chose jugée, quant à cette partie de la demande fondée sur le don gratuit.

Après une audition sur la défense en droit, la Cour la débouta par jugement du 14 mars 1853, sur le principe que, le Demandeur, ayant allégué la fraude, pouvait n'être pas assujetti à la prescription de dix ans.

A l'exception de la Défenderesse, le Demandeur répliqua que cette exception n'était pas fondée : 1° parce que la Défenderesse, Henriette Moreau, ne peut légalement invoquer la prescription de dix ans, relativement à la rescision des actes demandée par le Demandeur, attendu que Joseph Carrier avait été le tuteur, pro-tuteur et gardien de James Motz, et de son frère et de sa sœur qu'il représente, et qu'il ne leur avait jamais rendu compte, ni produit de pièces justificatives, et que, d'ailleurs, Joseph Carrier, ayant l'usufruit sa vie durant, de la succession de la mère du Demandeur, cette reddition de compte est due par sa succession, dont Henriette Moreau est en possession et que telle prescription n'a pu commencer à courir que du jour du décès de Joseph Carrier, arrivé récemment ; 2° parce que les actes dont la rescision est demandée sont entachés de fraude et de dol, et que, par la loi, la fraude et le dol ne prescrivent pas ; 3° que l'exception de chose jugée, invoquée contre la demande de moitié du don gratuit, n'est pas fondée, en ce que le jugement invoqué ne peut s'appliquer, et ne s'applique que quant à la moitié due par Joseph Carrier, laquelle n'est pas demandée, mais ne peut s'appliquer à la moitié due par Christiana McPhee, par rapport à laquelle le don gratuit n'est pas nul, icelle pouvant disposer valablement de ses biens par donation en faveur de ses propres enfants.

ANGERS, pour le Demandeur :

Le Demandeur, prétend avoir établi les points qui suivent : 1° nullité de l'inventaire du 31 août 1830 ; 2° nullité du transport du 27 avril 1831 ; 3° nullité du transport du 7 décembre 1833 ; 4° nullité du compte et de la quittance du 4 juillet 1839 ; 5° nullité du compte et de la quittance du 30 avril 1841.

Comme ces actes sont les seuls qui soient intervenus entre

Joseph Carrier et les mineurs Motz, leur nullité laisse ces derniers dans la position où ils seraient, si ces actes n'eussent jamais été passés.

Les points suivants sont aussi établis : 6° minorité de James Motz, lors de l'inventaire et du transport, 1830 et 1831 ; 7° minorité de William Andrew Motz lors du transport de 1833 ; 8° nullité de l'inventaire de trois sortes : 1° Point de légitime contradicteur, 2° point de production de pièces, 3° omission, recelés, dol et fraude ; 9° nullité de la reddition de compte, concernant la succession de Catherine Motz : 1° A cause de la non production de pièces, 2° parce qu'elle était basée sur un inventaire nul, celui de 1830. Il y a de plus dans cette reddition de compte une erreur de £20 contre les mineurs Motz ; 10° il n'y a point eu, il est vrai, continuation de communauté entre Joseph Carrier et les mineurs Motz, mais, à défaut d'inventaire, il a laissé confondre en une seule masse les successions de John Motz et de Christiana McPhee, et les biens de sa première et de sa seconde communauté ; 11° un point de droit incontestable est que l'on ne doit point avoir égard à la fausse dénonciation de majorité faite par un mineur ; 12° il est également certain que l'un des deux conjoints ne peut pas légalement exempter le survivant de faire inventaire ; 13° la prescription de dix ans contre l'action rescisoire, ne s'applique pas aux actes nuls de plein droit ; (1) 14° le tuteur est toujours tenu de rendre compte, et l'action dont il est passible ne se prescrit que par trente ans ; 15° il est également certain que le compte doit être exact et fidèle, et doit être accompagné de pièces justificatives ; 16° les quittances ne peuvent pas être assimilées à des transactions, et la prescription de dix ans ne leur est pas applicable ; 17° la prescription de dix ans ne s'applique pas aux actes entachés de dol et de fraude, si ce n'est à compter du jour où le dol et la fraude ont été découverts.

Autorités citées par le Demandeur sur les divers points indiqués plus haut.

Le temps de la prescription ne peut courir que du jour que le créancier a pu intenter sa demande. Pothier, *Obligations*, vol. III, p, 528, n° 679.

Le tuteur administrateur, etc., ne peut acheter aucune chose du bien dont il a l'administration. Pothier, *Vente*, vol. IV, p. 9, n°s 13 et 14.

Le mineur devenu majeur a 30 ans pour revendiquer ses immeubles aliénés. Pothier, *Traité des personnes*, vol. VII, p. 474 et 475.

Le mari survivant ne peut opposer aux héritiers de la femme,

(1) V. art. 2258 C. C.

contre leur demande aux fins de partage, que la prescription de 30 ans. Pothier, *Communauté*, vol. IX, p, 377, n° 534.

Les mineurs sont admis à la restitution contre leurs conventions, pour quelque lésion que ce soit. Pothier, *Obligations*, vol. III, p. 29, n° 40.

Toutes personnes qui ont géré les affaires d'autrui sont obligées d'en rendre compte, tuteurs, protecteurs, gardiens, etc.; jusqu'à ce qu'elles aient satisfait à cette obligation, elles sont toujours réputées comptables. Pothier, *Procédure civile*, 2e partie, ch. II, section 1re.

L'on n'a point d'égard à la fausse énonciation de majorité pour exclure les mineurs de la restitution. Pothier, *Procédure civile*, 5e partie, ch. IV, art. 2, parag. 1, 2 et 5.

Le titre conditionnel empêche la prescription, quand la condition est suspensive. Bousquet, *Dict. de droit*, vol. I, p. 521.

L'erreur du calcul dans une transaction doit être réparée. Idem, p. 547.

Le tuteur ne peut transiger avec le mineur devenu majeur sur le compte de tutelle. Idem, *verbo* transaction, p. 728 et 729.

Toute transaction sans reddition de compte est nulle. Idem, *verbo* transaction, p. 729; Merlin, *Questions de Droit*, verbo *tuteur*, parag. 3.

Toute transaction, tout contrat, passés entre le tuteur et le mineur devenu majeur, avant que le compte ait été rendu, n'obligent point le mineur, qui peut, quand bon lui semble, s'en faire relever et les faire déclarer nuls, quoiqu'il ait passé ces actes en majorité: car, en cette matière, le mineur devenu majeur est toujours réputé mineur vis-à-vis de son tuteur jusqu'à ce qu'il ait rendu compte. Pothier, *Traité des Personnes et des choses*, pp. 479, 480 et 481.

Inventaire doit être fait avec un légitime contradicteur. Art. 240 de la Coutume de Paris.

Si une donation est faite par un tuteur à son mineur, il ne peut opposer le défaut d'acceptation. Pothier, *Traité des Donations*, vol. II, p. 30.

Le temps pour la prescription ne peut courir contre le propriétaire d'une chose, tant qu'il se trouve dans l'impossibilité d'intenter son action, Pothier, *Prescription*, nos 22 et 23.

La prescription, s'il y a eu dol ou erreur, ne commence à courir que du jour où ce dol ou cette erreur ont été découverts. L'obligation de rendre compte ne peut se prescrire que par 30 ans. Bousquet, vol. II, p. 755, *verbo* tutelle.

La simple déclaration de majorité faite par le mineur ne fait point obstacle à sa restitution. Idem, vol. II, pp. 282 et 283.

Prescription est de 30 ans contre l'action en reddition de compte, et contre l'action rescisoire des transactions intervenues entre le tuteur et son pupille. Actes de Notoriété, pp. 73, 154,

157, 478, et pp. 102 à 109, 148 à 155, 226, 251, 252, 253. Le tuteur ne peut abandonner la tutelle. Meslé, *des Minorités* p. 226.

Cession faite au tuteur est nulle. Idem, p. 253.

Décharge sans compte est nulle. Dol se présume en ce cas. Idem, pp. 292, 293 et 294 ; Chenu, *Questions de Droit*, cent. 1, quest. 22, 23, 24, 27 et 28 ; Meslé, 295 ; Arrêté du président Lamoignon, art. 127 ; et Meslé, pp. 295, 296, 297, 649, 650.

Le tuteur qui a payé d'avance ne peut exiger la restitution, mais seulement peut déduire sur son compte. Meslé, p. 664.

Transaction entre tuteur et pupille est nulle, si le compte n'a pas été rendu, et on en peut demander la cassation durant 30 ans. Duplessis, 1re partie, sect. 7, p. 323, n° 1 ; Guyot, *Prescription*, pp. 327 et 379.

On a distingué entre les transactions faites *visis tabulis* et celles qui étaient faites *non visis tabulis*. Ces dernières étaient nulles. Guyot, p. 329 ; Domat, vol. I, p. 181 ; Lacombe, *Recueil de Jurisprudence*, p. 114, Transactions, &c; article 1er, titre 29 de l'ordonnance de 1667 ; idem, p. 114 : " Un acte portant décharge de rendre compte donné à un tuteur *non visis tabulis* n'est pas valable ; en ce cas la lésion se présume, et l'action dure 30 ans. Rogron, *Code français* expliqué, pp. 77 et 419 ; Guyot, *Lésion*, p. 666 ; Solon, vol. II, No 336 : (1) ratification d'actes nuls ne produit aucun effet.

GAUTHIER et STUART, G. O., pour la Défenderesse, soutenaient en substance ce qui suit :

James Motz poursuit en trois qualités différentes : 1° en qualité de légataire universel, pour un cinquième, dans la succession de Christiana McPhee, sa mère, en vertu de son dit testament ; 2° comme héritier, pour moitié, dans la succession de Catherine Motz, sa sœur, décédée en minorité, elle-même légataire universelle pour un cinquième, en vertu du testament de sa mère Christiana McPhee ; 3° comme cessionnaire de William Andrew Motz, son frère, de tous les droits mobiliers et immobiliers dans la succession de John Motz, son père, de Christiana McPhee, sa mère, et de Catherine Motz, sa sœur.

En sa première qualité, James Motz demande : 1° l'annulation de l'inventaire du 31 août 1830, fait devant Louis Panet et son confrère, notaires, par Joseph Carrier, tant en son nom comme commun en biens avec Christiana McPhee, son épouse, que comme son légataire en usufruit et en propriété pour un cinquième, comme tuteur à Joseph Carrier, son fils mineur, issu de son mariage avec Christiana McPhee, et comme tuteur à Andrew William Motz et Catherine Motz, enfants mineurs issus du mariage de John Motz et Christiana McPhee ; 2° la rescision

(1) V. art. 311 C. C.

du transport, par lui-même, James Motz, à Joseph Carrier, devant Panet et son confrère, notaires, le 27 avril 1831 ; 3° la recision de l'acte de règlement de compte fait entre James Motz et Joseph Carrier devant Louis Panet et son confrère, notaires, le 30 avril 1841 ; 4° la demande de £300, pour moitié du don gratuit par Joseph Carrier et Christiana McPhee, par acte fait à Québec, devant Scott, notaire, le 17 juillet 1820.

James Motz, en sa première qualité, demande encore : 1° l'annulation du dit inventaire, parce qu'il a été fait hors de la présence de Lewis Harper, tuteur nommé aux mineurs Motz en 1823, et sans légitime contradicteur, et que lui, James Motz, était mineur.

L'inventaire a été fait par Joseph Carrier, nommé tuteur à Andrew William Motz et Catherine Motz, James Motz présent pour lui-même et comme subrogé tuteur à son frère et à sa sœur. On ne peut se rendre compte ni expliquer la nomination de Lewis Harper comme tuteur, si ce n'est, comme dit M. Panet, notaire, *témoin* entendu dans la cause, pour intenter une action en délivrance de legs de la part de Joseph Carrier et Christiana McPhee, son épouse. En effet à quoi bon, et dans quel autre but avoir fait nommer ce tuteur ? Il n'y avait aucun bien des mineurs à administrer, et Joseph Carrier et son épouse vivaient avec leurs mineurs et les ont tous élevés. Tous les biens appartenaient à la mère en vertu du testament de son mari, John Motz.

De plus la nomination de Lewis Harper faite dans un autre but, était illégale et aurait pu être mise de côté, vu que la mère vivait dans le temps avec ses enfants mineurs.

James Motz n'a pas produit d'acte de baptême, et a prétendu être né à St-Jean de Terreneuve, et que les registres auraient été brûlés. Mais il n'y a point de preuve légale de ce fait. Les témoins ne s'accordent point sur l'âge de James Motz ; et, d'après les uns, il aurait été mineur lors de l'inventaire, et d'après les autres, il aurait été majeur ; et, en effet, il est bien difficile de prouver l'âge d'un jeune homme par l'apparence, quand il s'agit de quelques mois de moins que 21 ans ou de quelques mois de plus. Néanmoins on ne peut faire autrement que d'en venir à la conclusion, que James Motz était majeur peu de mois avant ou peu de mois après l'inventaire. Louis Panet, dans son témoignage, dit que James Motz a dit qu'il était majeur, lorsqu'il a été nommé subrogé tuteur, et le Révd M. Parant, Ptre, du Séminaire de Québec, prouve que le nom du Demandeur est entré sur un registre du premier octobre 1824, comme étant âgé de 15 ans et deux mois. Les témoins du Demandeur entendus à St-Jean de Terreneuve, disent qu'il est né en 1809 ou 1810, que le régiment dans lequel était son père, John Motz, est parti pour le Canada en 1813 ou 1814, que le

Demandeur avait alors 4 ou 5 ans ou 5 à 6 ans, ce qui le met majeur lors de l'inventaire.

James Motz prétend aussi que le dit inventaire est incomplet, incorrect et faux.

Le Demandeur connaissait mieux, et plus que les témoins entendus dans cette cause, l'état des biens possédés par Joseph Carrier et Christiana McPhee, son épouse, ayant toujours été avec eux ; il connaissait aussi la valeur des propriétés, le loyer que devait rapporter leur maison de la Basse-Ville.

Supposant même que cet inventaire fût nul, pour les causes mentionnées par James Motz ; par le testament de Christiana McPhee, Joseph Carrier était exempté de faire inventaire. Joseph Carrier et James Motz ont pu s'en servir comme un état des biens, et pour faire les diverses transactions qu'ils ont faites entre eux.

Dans cette première qualité James Motz demande : 2° la rescision du dit acte de transport du 27 avril 1831, parce qu'il est entaché de dol et fraude ; parce que Joseph Carrier ne lui avait pas rendu compte des successions de ses père et mère, et qu'il était minenr ;

La Défenderesse, en réponse à cette dernière partie, renvoie à ce qu'elle a allégué sur la demande de nullité de l'inventaire, à ce qui a rapport à la connaissance qu'avait alors James Motz de l'état de la succession de sa mère, et à l'acte de mariage de James Motz, 3 mai 1831, où il se dit majeur et négociant, et à la prescription plaidée par son exception. Dans cette même première qualité, James Motz demande : 3° la rescision du règlement de compte entre lui et Joseph Carrier du 30 avril 1841, parce qu'il n'a pas été précédé d'une reddition de compte valable et légale, ni acccompagné de pièces justificatives.

Par cet acte de règlement de compte du 30 avril 1841, James Motz, dans les termes exprimés au dit acte, " confirme et " approuve le compte rendu par Joseph Carrier de la succession " mobilière et immobilière de Catherine Motz, le 4 juillet 1839, " devant Le Panet, notaire, voulant et entendant qu'icelui soit " exécuté avec lui, quant à sa part, suivant sa forme et teneur ; " et, en conséquence du règlement et arrêté de compte ci-dessus, " tient Joseph Carrier, et tous qu'il appartiendra, quittes du " reliquat du dit compte, et de rendre aucun autre compte quel- " conque, déchargeant Joseph Carrier de toutes demandes et " et réclamations, relativement à la succession mobilière et " immobilière de Catherine Motz, et de toutes autres demandes " quelconques, qu'il pourrait avoir contre lui jusqu'à ce jour." Ce règlement de compte est basé sur l'inventaire et sur l'acte de transport de James Motz à Joseph Carrier du 27 avril 1831, lequel est, par conséquent, ratifié dix ans après, par cet acte du 30 avril 1841. Lors de la passation de ce dernier acte, la pres-

cription était alors acquise au dit Joseph Carrier contre l'acte du 27 avril 1831, et James Motz était alors avocat, et il est établi dans la cause, par ses propres témoins, qu'il devait savoir, et qu'il savait et connaissait la valeur des biens de la succession de sa mère. Lors de l'institution de l'action, il y avait même plus de dix ans que l'acte du 30 avril 1841, avait été consenti, et, partant, prescription acquise. Le dit James Motz n'allègue ni dol ni fraude contre ce dernier acte, et il n'en a pas été prouvé.

Autorités citées par la Défenderesse à l'appui de sa défense touchant la prescription.

Arrêts de Louet, lettre T., page 430 : " Mais si le mineur qui a transigé, ne se pourvoit dans les dix ans de la majorité, ou le majeur dans les dix ans du contrat, contre les contrats et transactions faits avec son tuteur ; bien qu'il n'y eût aucune reddition de compte, ni représentation d'inventaire, partage ou autres actes ; il n'y sera plus recevable les dix ans passés."

Ancien Dénizart, *verbo* tutelle, page 779, n° 103 : " Les dé-
" charges de compte de tutelle, quoique données, *non visis*
" *tabulis, non dispunctis rationibus*, ne peuvent plus être
" attaqués après les dix années de leur date, postérieure à la
" majorité, suivant les arrêts rapportés par Louet, et Brodeau,
" son annotateur, sur la lettre T, sommaire 3, ce temps ayant
" été suffisant pour que le mineur, devenu majeur, pût exa-
" miner s'il avait été lésé."

Merlin, *Répertoire*, 11e volume, *verbo* rescision, page 697, 2e colonne, et page 698 : " Depuis les ordonnances de 1533 et
" 1539, on a tenu pour maxime générale, en France, que les
" mineurs ont dix ans depuis leur majorité pour obtenir des
" lettres de rescision.

" L'article 1304 du Code civil porte que, dans tous les cas
" où l'action en nullité ou en rescision d'une convention n'est
" pas limitée à un moindre temps par une loi particulière, cette
" action dure dix ans.

" Aujourd'hui, dans toute la France, l'action en nullité des
" traités faits entre le mineur devenu majeur, et son ci-devant
" tuteur, et non précédés, tant de la reddition d'un compte dé-
" taillé, que de la remise des pièces justificatives, se prescrit
" par dix ans, à compter du jour de la majorité, laquelle s'ac-
" quiert depuis la loi du 20 septembre 1792, par l'âge de vingt
" et un ans. " *V.* le Code Civil, art. 175 et 1304.

9e Merlin, *Répertoire*, page 559, *verbo* prescription : " Dans le
" droit romain l'action rescisoire qui était fondée sur le dol, se
" prescrivait par le laps de deux ans. C'est ce que nous apprend
" la loi dernière *de dolo* ;

" Mais dans nos mœurs il faut dix années pour la pres-
" crire. "

1er vol. de Despeisses, *des Contrats*, partie 1ère, titre 16, page 588, *nota :* " La jurisprudence du Parlement de Paris est que " le mineur doit se pourvoir dans les dix ans de majorité contre " la transaction faite avec son tuteur avant le compte, et *non* " *visis tabulis*, sinon qu'il est non recevable après les dix ans. "

15e vol. de Guyot, *verbo* rescision, pages 328, 329 ; 1er vol. de Pothier, *Contrat de vente*, n° 347 ; Lacombe, *Recueil de Jurisprudence*, verbo *restitution*, section 1ère, n° 4 ; Meslé, *Traité des Minorités*, pages 365, 492 et 493 ; Guyot, *Répertoire*, verbo *transaction*, page 246, vol. 17 ; Répertoire de Merlin, vol. 10, *verbo* ratification, page 723.

En sa première qualité, le dit James Motz demande, 4° sa part du don gratuit. James Motz n'a pas prouvé le don gratuit. La copie filée n'est pas authentique ; point de certificat, point de date. D'ailleurs le don gratuit est rejeté par le jugement.

2e qualité. En sa qualité d'héritier pour moitié dans la succession de Catherine Motz, sa sœur décédée en minorité, James Motz demande encore la rescision du règlement de compte du 4 juillet 1839. La prétention de James Motz en cette qualité, est différente seulement de celle émise en sa première qualité, en ce que Joseph Carrier était le tuteur de Catherine Motz ; mais, dans ce cas-ci, il y a un compte rendu en détail, accepté par James Motz et approuvé par lui dans l'acte du 30 avril 1841.

3e qualité. En sa qualité de cessionnaire de William Andrew Motz, son frère, James Motz demande; 1° la rescision du dit inventaire ; 2° la rescision de la cession par Wm Andrew Motz au dit Joseph Carrier, devant Panet et confrère, notaires, le 7 décembre 1833 ; 3° la rescision de la reddition de compte du 4 juillet 1839, et approbation du compte par Wm A. Motz.

1° L'acte de transport, qui donne au dit James Motz sa qualité de cessionnaire de Wm. A. Motz, est un acte illégal et nul à sa face, en autant qu'il est fait au Demandeur, en sa qualité d'avocat, qui ne peut recevoir de transport de droits litigieux.

2° Le dit acte de transport ne donne pas au dit James Motz le droit de demander le rescision des actes auxquels il a consenti, et qui sont mentionnés ci-dessus. Pour avoir ce droit, il faut qu'il soit mentionné spécialement dans le transport ou cession, ce qui n'a pas été fait.

Lacombe, *Recueil de Jurisprudence*, verbo *restitution*, page 597, n° 15. " Cession générale de droits et actions ne " comprend les rescindants et rescisoires ;" *verbo* transport, page 764, n° 6. Arrêts de Louet, lettre T, page 431, 2e colonne: " Les arrêts ont établi une autre exception en la personne du " cessionnaire des droits des mineurs qui n'est point favorable, " ni recevable à demander la rescision de la transaction contre

" laquelle le mineur ne s'est point pourvu. Autre chose serait " si la transaction ou la quittance, et acte de décharge, portait " qu'il sera loisible au mineur de demander reddition de son " compte, en rapportant et restituant ce qui lui a été donné."

Wm. A. Motz a approuvé la reddition de compte du 4 juillet 1839.

La Cour Supérieure a rendu le jugement suivant :

" La cour, considérant que le Demandeur a droit, en vertu du testament de Christiana McPhee, sa mère, veuve en premières noces de John Motz, et épouse en secondes noces de Joseph Carrier, reçu à Québec, devant Louis Panet et son confrère, notaires, le vingt-quatrième jour de décembre mil huit cent vingt-huit, sujet à l'usufruit en faveur de Joseph Carrier, sa vie durant, à trois cinquièmes au total des biens délaissés par Christiana McPhee, savoir : un cinquième, comme étant aux droits de William Andrew Motz, son frère, suivant acte de transport, sous seing privé, attesté du seing et sceau du maire de la ville de Buffalo, dans l'Etat de New-York, et déposé le vingt-quatre avril mil huit cent cinquante-deux, en l'étude de Petitclerc, notaire, William Andrew Motz étant aussi légataire universel pour autant; un dixième comme représentant, en vertu du même transport, William Andrew Motz, héritier pour moitié de Catherine Motz, sa sœur, aussi légataire universelle pour un cinquième de sa dite mère, et décédée en minorité et *ab intestat ;* et enfin le dit James Motz pour un dixième comme héritier aussi pour moitié de Catherine Motz ; que le Demandeur était mineur, lors du prétendu inventaire, fait à Québec, par devant Louis Panet et son confrère, le trente et un août mil huit cent trente, par Joseph Carrier, des biens de la communauté d'entre lui et la dite Christiana McPhee, ainsi que le vingt-sept avril mil huit cent trente et un, date du transport de droits successifs par le Demandeur au dit Joseph Carrier, par acte devant Panet et son confrère ; que William Andrew Motz était pareillement mineur, lors de la cession par lui faite au dit Joseph Carrier, par acte devant Panet et son confrère, en date du sept décembre, mil huit cent trente-trois ; que le dit inventaire est entaché de lésion, dol et fraude, et confond les biens propres à Christiana McPhee avec ceux de la communauté ; que le dit inventaire est nul en droit comme fait sans contradicteur ; considérant, principalement, que, lors des actes du vingt-sept avril, mil huit cent trente-et-un, et sept décembre mil huit cent trente-trois, il n'a été rendu par Joseph Carrier aucun compte de la tutelle qu'il avait gérée et administrée, ni fait remise des papiers concernant cette gestion ; que l'acte du quatre juillet mil huit cent trente-neuf, reçu devant Panet et son confrère, notaires, et intitulé : " reddition de compte par Joseph Carrier à William Andrew Motz," ne

contient non plus aucun compte, mais seulement la mention de la somme que, d'après le dit inventaire, Joseph Carrier reconnaissait afférer à la succession de Catherine Motz; que l'acte du trente avril mil huit cent quarante et un, reçu devant le même notaire et son confrère, intitulé: " règlement de compte entre Joseph Carrier et James Motz," ne comprend non plus aucun compte; que, vu l'absence des dits comptes et pièces, et vu le dol et la fraude, le Demandeur, ès-dits noms, est encore aujourd'hui recevable en droit à se pourvoir en restitution contre les dits actes et à invoquer leur nullité, déclare le dit inventaire du trente et un août mil huit cent trente, et les actes du vingt-sept avril mil huit cent trente et un, sept décembre mil huit cent trente-neuf, et trente avril, mil huit-cent quarante et un, nuls et rescindés, et remet le Demandeur, ès-dits noms, aux mêmes état et droits que s'ils n'eussent pas été passés, sauf à rendre compte de ce qui a été reçu par lui, ou ceux aux droits desquels il agit, avec l'intérêt jusqu'au décès du dit Joseph Carrier; condamne la Défenderesse, ès-qualités, à rendre au Demandeur, sous quatre mois de la signification du présent jugement, un compte bon et fidèle et sous serment, de la gestion du dit Joseph Carrier des biens appartenant aux dits James Motz, William Andrew Motz, et Catherine Motz, y compris le compte des biens, meubles et immeubles, dépendant de la succession de Christiana McPhee, comprenant tant ceux qui lui étaient propres, que ceux dépendant de sa communauté avec Joseph Carrier, à l'époque du décès de Christiana McPhee; ordonne que, pour constater les biens de la dite succession et de la dite communauté avec Joseph Carrier, à l'époque du décès de Christiana McPhee, il sera procédé, sous le délai ci-dessus, à en dresser bon et fidèle inventaire, suivant la loi; et la cour, admettant la prétention du Défendeur, quant au don gratuit pour un dixième, savoir, pour le cinquième de la moitié, renvoie le dit demandeur de cette partie de sa demande qui a rapport au prétendu don gratuit, et à la continuation de communauté après le décès de la dite Christiana McPhee, réserve à faire droit ultérieurement sur les autres conclusions de la déclaration."

BADGLEY, juge: La principale question qui s'élève en cette cause, est de savoir si le Demandeur est non recevable à faire prononcer la nullité des divers actes mentionnés dans son action, attendu qu'il s'est écoulé plus de dix ans depuis la passation de ces actes et depuis la majorité des enfants Motz. La Défenderesse a plaidé cette prescription de 10 ans, outre la chose jugée, quant à ce qui concerne le don gratuit. A ce plaidoyer de prescription, le Demandeur a repliqué spécialement, que Carrier, ayant été le tuteur, pro-tuteur et gardien des enfants Motz, ne pouvait invoquer contre eux cette prescrip-

tion, non plus que ses représentants ; qu'il n'avait produit aucun compte ni pièces justificatives, et que, conséquemment, il ne pouvait invoquer la prescription en faveur de transactions faites sous ces circonstances ; que Carrier avait l'usufruit des biens délaissés par sa femme, Christiana McPhee, et que, conséquemment, les héritiers Motz n'étaient en droit d'agir qu'à l'expiration de cet usufruit; que les transactions attaquées étaient frauduleuses et nulles de plein droit, et qu'en conséquence il n'y avait point lieu à la prescription invoquée ; et enfin que la chose jugée aurait pu être opposée à la partie du don gratuit due par Carrier, mais non à celle due par Mme Motz, laquelle seule était réclamée.

La question est donc quant à la validité de ce plaidoyer de prescription de 10 ans. Le Demandeur demande l'annulation de tous les actes intervenus entre Carrier et les héritiers Motz, depuis l'inventaire du mois d'août 1830, qu'il considère comme une nullité absolue.

Je considérerai d'abord cet inventaire du 31 août 1830, qui est la base sur laquelle reposent les prétentions des parties.

Il est de principe certain, qu'arrivant la dissolution de la communauté, le devoir du survivant est de faire un bon et loyal inventaire : rien ne peut le soustraire à cette obligation, ni la volonté du testateur, ni une stipulation à cet effet dans un contrat de mariage. Lebrun, *Communauté*, page 562, dit : " Il n'est point juste que, par une stipulation de cette sorte l'on fasse préjudice aux enfants du premier lit, et que le mari soit dispensé par là indirectement d'une formalité établie pour un intérêt public : car la nécessité de faire inventaire étant imposée par la loi, et pour l'intérêt des mineurs, le père ne s'en peut exempter, et on ne peut imposer silence aux enfants, etc., etc. : ce qui est fondé sur les plus pures maximes. " Proud'hon, *de l'Usufruit*, vol. II, page 287, dit : " La dispense, ou la défense même de faire inventaire, en quelques termes qu'on la trouve exprimée dans le testament, ne doit avoir d'autres effets que de forcer l'héritier à supporter les frais de l'inventaire auquel il voudra faire procéder. " Pothier, *Communauté*, No 680, dit : " L'inventaire des biens de la communauté est la première démarche pour parvenir au partage des biens de la communauté après sa dissolution. " Serpillon, *Code civil*, page 533, dit : " Une clause de ne pas inquiéter le comptable ne le dispense pas de rendre compte ; " et il cite un arrêt du 12 octobre 1749, où il a été jugé que la décharge de rendre compte n'opère pas une libération absolue à cet égard.

Le Nouveau Dénizart, *verbo* continuation de communauté, page 414, n° 7, dit que telle est l'opinion la plus commune. Ferrière, *verbo* tutelle, p. 154, dit : " Le tuteur est obligé de faire inventaire, nonobstant la décharge d'en faire par le testateur."

Ayant établi que Carrier ne pouvait pas être exempté de faire inventaire, nonobstant la clause à cet effet dans les testaments de Christiana McPhee, il s'ensuit qu'il était tenu de faire un bon et loyal inventaire, suivant les dispositions de la coutume, avec légitime contradicteur et personne capable, contenant tous les biens qui étaient communs au temps du décès de son épouse, soit meubles ou conquêts immeubles, et de la faire clore en justice, et ce, à peine de nullité.

Ferrière, *Petit Commentaire de la Coutume de Paris*, vol., II, art. 240, page 83, dit : " L'inventaire doit être fait en présence de personnes capables, et avec le légitime contradicteur; en sorte que, s'il y a des mineurs, il doit être fait en présence de leur tuteur, et, si le survivant est leur tuteur, il doit être fait en présence d'un subrogé tuteur et par lui signé : autrement, il y aurait nullité, et sera réputé non valablement fait." Lebrun, *Communauté*, pp. 564,565, dit : " Lorsque l'inventaire est fait sans légitime contradicteur, ce défaut porte coup sur la foi de l'inventaire, parce qu'un inventaire sans contradicteur, à proprement parler, n'est pas un inventaire. " Merlin *Répertoire*, verbo *continuation de communauté*, n° 6; Pothier, *Communauté*, n°s 796, 797 ; Ancien Dénizart, *verbo* continuation de communauté, p. 685, n°s 3 et suivants ; Nouveau Dénizart, *verbo* continuation de communauté, pp. 414, 415, 416, n°s 15 et 19 ; Actes de notoriété, pp. 189, 190, 478, 479.

Suivant tous ces auteurs, l'inventaire doit être exact et fidèle ; il doit contenir une exacte énumération des biens; les biens, meubles, bijoux, ustensiles, marchandises, etc., doivent être estimés et prisés par des appréciateurs jurés, à Paris, par les huissiers priseurs, officiers que nous n'avons pas ici, ou par d'autres personnes qui prêtent serment, et, si les parties n'en conviennent, le juge en nomme un. C'est une formalité invariable et indispensable. L'inventaire doit être aussi fait sans recélés ou omissions, et il doit être clos en justice. Lebrun, pp. 564 et 565 ; Pothier, *Communauté*, p. 558 ; Meslé, *des Minorités*, p. 631, n°s 41, 42 et 43 ; l'Ancien Dénizart, *verbo* continuation de communauté, p. 685, n°s 3, 8 et 9, tiennent cette doctrine. Dénizart dit : " Il ne doit point y avoir de dol ni de fraude de la part de celui des père et mère qui survit ; un inventaire nul et frauduleux ne doit pas être considéré : c'est comme s'il y en avait pas eu : " et, à l'appui de cette opinion, il cite les Actes de notoriété, p. 190, et Duplessis qui dit : " Quand il y a des omissions dans des inventaires, on les déclare nuls, en haine des recelés." Dénizart ajoute là-dessus : " Le sentiment de Duplessis a été suivi par les arrêts que je rapporte dans ma collection à l'article " continuation de communauté," la coutume exige, en effet, bon et fidèle inventaire. " Le même auteur, à la page 479, après avoir énuméré les formalités susmentionnées

pour faire un bon et valable inventaire, ajoute : " Toutes ces conditions prescrites par la coutume sont de rigueur, et si essentielles que l'omission d'une de ces formalités emporte la nullité de l'inventaire et le rend sans effet. "

L'une des premières formalités requises est que l'inventaire soit fait en présence du tuteur ou mineur, et si le comptable est ce tuteur, en présence du subrogé tuteur et personne capable. Un mineur ne peut pas être tuteur ; sa nomination serait une nullité. Ferrière, *verbo* tutelle, p. 56, dit : " Un mineur ne peut être tuteur ; ne serait-ce pas, en effet, une chose étrange qu'un mineur, qui est jugé incapable de se conduire lui-même et que d'autres conduisent, soit admis à la tutelle ? " A la page 57, le même auteur ajoute : " De ce que la loi prohibe d'appeler à la tutelle le mineur, point de doute que, si le juge ne laissait pas de le nommer tuteur, la nomination qu'il en ferait serait nulle de plein droit : car tel est l'effet des lois prohibitives, d'annuler, *ipso jure*, tout ce qui se trouve fait au préjudice de la prohibition, quand même la nullité, ne serait pas expressément prononcée. Le mineur ne serait pas obligé de désavouer et n'encourrait aucun péril. Bien plus, le mineur voulût-il agréer le choix fait, son consentement deviendrait inutile. "

L'énonciation de majorité faite par le mineur ne serait d'aucun effet. Pothier, vol. VII, *Procédure civile*, page 313, dit : "On n'a point d'égard à la fausse énonciation de majorité, pour exclure les mineurs de la restitution. C'est à celui qui contracte avec le mineur de s'informer de son âge. Ceux qui contracteraient avec des mineurs, feraient insérer dans l'acte qu'ils se sont dits majeurs, et diraient toujours que les mineurs les ont trompés, quoique souvent ce serait plutôt un artifice pratiqué de leur part que de celle des mineurs. " Solon, *des Nullites*, page 185, tient la même doctrine.

Dans l'espèce, Carrier qui épousa la mère du Demandeur, quand celui-ci n'avait pas plus de 9 ans, devait connaître son âge, mieux que le Demandeur lui-même. Il y a deux arrêts de Louet, p. 142, n°s 2 et 3, et pp. 144 et 145, n° 13, au même effet. Il y a aussi un arrêt du Parlement de Paris du 16 février 1691, dans lequel, le procureur général Lamoignon observa : Il est reconnu qu'il est aussi facile d'engager un mineur de se dire majeur que de vendre son bien. Voir encore un autre arrêt du 26 avril 1629, rapporté par Louet, p. 71, n° 14.

La preuve de la naissance des enfants Motz, à l'exception de celle de Catherine, est faite par témoins. Ils sont nés, à la suite d'un régiment, de parents attachés au service militaire, dans un pays lointain. L'on n'a pu découvrir les registres contenant l'acte de naissance de ces enfants, mais, du témoignage de la femme Murphy et autres, et des déclarations de sa mère, il résulte que le Demandeur est né en octobre 1810, et qu'il était

mineur quand il a été nommé subrogé tuteur et quand l'inventaire a été fait ; ce qui rend l'inventaire nul. D'un autre côté, Carrier ne pouvait lui-même se faire nommer tuteur en juillet 1830, lorsqu'il avait fait lui-même nommer tuteur le nommé Lewis Harper en 1823, lequel vivait encore en 1830. Sa nomination était nulle, et par suite l'inventaire était nul. Voir un jugement rendu à Montréal, dans la cause de *Dunn* contre *Beaudry*. Ainsi, l'inventaire a été fait par Carrier, sans qu'il eût la qualité qu'il assumait, en présence du Demandeur, qui ne pouvait exercer l'office de subrogé tuteur que Carrier lui avait fait conférer. Pourquoi, il faut dire que ce cet inventaire a été fait sans légitime contradicteur, ce qui le rend encore nul. D'ailleurs il résulte de la preuve que, dans cet inventaire, il y a des omissions considérables.

La cour en est donc venue à la conclusion que cet inventaire est frappé de nullités absolues, *ab initio*, et que les parties doivent être remises au même état qu'elles étaient avant la passation de cet acte.

La loi et la coutume déclarent de tels inventaires nuls de plein droit, et, dans pareil cas, il n'aurait pas été nécessaire, en France, d'obtenir des lettres de rescision, parce que, quand un acte est absolument nul, la loi ne requiert point des lettres de rescision dans les dix ans de la date de son exécution. Louet, vol. II, pp. 305 et 306, n°s 23 et 27, rapporte un arrêt du 27 janvier 1699, par lequel il a été jugé, que la prescription de 10 ans pour se pourvoir par lettres de rescision contre un acte nul, n'avait point lieu et ne pourrait être objectée ; les parties remises au même état comme avant, etc., etc. ; et un arrêt du 24 mai 1661, au même effet, par lequel une obligation fut annulée 29 ans après sa date : Henrys, vol. II, pp. 266 et 267. Quand l'acte est nul, d'une nullité radicale, le bénéfice de restitution sert même un majeur, cela est juste et raisonnable, quand l'acte principal est nul par nullité radicale, et qui choque le droit public, en ce cas, la même nullité porte conséquence pour tout ce qui en dépend, et l'accessoire n'est pas de meilleur aloi que le principal ; c'est une influence commune, et qui ruine aussi bien la fidéjussion que l'obligation principale, la minorité seule ne suffirait, mais quand, outre la minorité, il y a quelque autre nullité radicale, elle sert aussi bien au majeur qu'au mineur. A la page 267, le même auteur ajoute : C'est parce que en effet, il y aurait du dol, soit qu'on considère la qualité du tuteur, soit qu'on s'arrête à celle du mineur, dans l'un et l'autre cas.

Pothier, vol. VII, *Procédure civile*, p. 311, dit : " Les actes nuls de plein droit n'ont pas besoin de lettres de rescision pour être déclarés tels. " Merlin, verbo *rescision*, page 185 ; Ferrière, vol. II ; *Petit Commentaire*, p. 96, article 240.

Merlin, *verbo* nullité, n° 1, dit : " Tout acte fait par une

personne que la loi a déclarée incapable, ou dans une forme qu'elle proscrit, est un acte que l'on doit regarder comme nul, et il n'est pas nécessaire que la peine de nullité soit expressément prononcée."

Solon, page 4, *Des Nullités d'ordre public.*

Quand l'acte de cession indique que l'intention des parties a été de transporter l'action rescisoire, il n'est pas nécessaire que la cession des rescindants et rescisoires soit expresse. Guyot, *verbo*, rescindant et rescisoire.

Il n'y a pas eu de ratification expresse de l'inventaire, lequel était nul de plein droit. Solon, vol. II, page 253, n° 294, dit: "Confirmer un acte ou le ratifier, c'est lui donner une force qu'il n'aurait pas eue par lui seul. La source du droit des parties est uniquement dans le premier acte, mais c'est par l'acte confirmatif que le droit devient irrévocable ; le premier le fait naître, le second lui donne la force et l'action. *Quod nullum est non potest confirmari.*"

Ricard, *des Donations*, n° 619, tient la même doctrine.

Louet, pages 736 et 737, cite un arrêt à cet effet du 27 novembre 1585. Idem, page 738 : "Toute transaction faite entre le tuteur et mineur devenu majeur est nulle, s'il n'y a eu compte." Ferrière, *Tutelle*, page 365 ; A. Dénizart, *verbo* compte, p. 578, n°s 15 et 16 ; Merlin, *verbo* tutelle, page 223. (*5 D. T. B. C.*, p. 433.)

LELIÈVRE et ANGERS, pour le Demandeur.

GAUTHIER et LEMIEUX, pour la Défenderesse.

STUART, G. O., Conseil.

MINORITE.—PREUVE.—USUFRUIT.—REDDITION DE COMPTE. PRESCRIPTION.—RESCISION.—INVENTAIRE.

BANC DE LA REINE, En APPEL, Québec, 10 mars 1857.

Présents : SIR L. H. LA FONTAINE, Bt., Juge en Chef, CARON, MONDELET et SHORT, Juges.

MOREAU, Appelante, et MOTZ, Intimé.

Dans cette cause, la Cour Supérieure, siégeant à Québec, composée de Bowen, Juge en Chef, Morin et Badgley, juges, avait rendu, le cinq septembre 1855, un jugement en faveur de l'Intimé, décidant les points suivants : (1)

1° Que tant qu'une première tutelle existe, une seconde ne peut avoir lieu, et que tous les actes faits par un second tuteur sont nuls ;

2° Qu'un inventaire fait sans y appeler le premier tuteur est nul;

3° Que si le subrogé tuteur, qui a comparu à tel inventaire, est encore mineur, l'inventaire est nul ;

(1) 3 *R. J. R. Q.*, p. 347.

4° Que l'huissier, qui a prisé les effets portés à l'inventaire, doit être assermenté, à peine de nullité de l'inventaire ;

5° Que des inexactitudes, de fausses évaluations, des recels dans un inventaire, le rendent nul, et constituent en fraude celui qui l'a fait ;

6° Que toutes transactions, quittances et décharges, intervenues entre tel tuteur et des mineurs devenus majeurs, ayant pour base tel inventaire incorrect et frauduleux, sont nulles de plein droit ;

7° Que des transactions intervenues entre un tuteur et des mineurs devenus majeurs, sans qu'il ait été fait un bon et loyal inventaire, sans reddition de compte et sans production de pièces justificatives, sont nulles de plein droit ;

8° Que l'action rescisoire, dans un pareil cas, ne se prescrit pas par dix ans, lorsqu'il y a dol et fraude ;

9° Qu'en l'absence de registres, l'état civil d'une personne peut être prouvé par les dires de ses parents et par témoins.

Ce jugement de la Cour Supérieure, est infirmé par la Cour d'Appel, par lequel tribunal il est,

Jugé : 1° Que dans l'espèce, il n'existait pas d'acte authentique constatant l'époque de la naissance de l'Intimé ; que le 21 août 1830, l'Intimé ayant déclaré être majeur, il lui incombait d'établir le fait de sa prétendue minorité par une preuve claire et précise, ce qu'il n'avait pas fait ; qu'il en était de même quant à William Andrew Motz ;

2° Que J. C. ayant l'usufruit des biens légués en propriété à William Andrew et Catherine Motz, dont il était tuteur, et que n'ayant jamais été tuteur de l'Intimé, dans ces circonstances, il n'était pas tenu de rendre compte aux trois enfants Motz, et que par conséquent, l'absence de reddition de compte n'était pas un moyen que l'Intimé pût valablement invoquer pour faire annuler les traités que lui et son frère avaient faits avec le dit J. C. et que l'Intimé et son frère étant réputés majeurs, lorsque ces traités avaient eu lieu, iceux pouvaient être valablement faits, tant pour leurs propres parts que pour celles de leur sœur décédée en minorité ;

3° Que l'action en nullité, portée par l'Intimé, était prescrite par le laps de dix années écoulées depuis la passation des actes incriminés ;

4° Qu'il n'avait pas été prouvé que l'inventaire du 31 août 1830, fût entaché de dol et de fraude, et que les erreurs et omissions qui y ont été signalées pouvaient seulement donner lieu à une demande en réformation ou rectification, et que, par conséquent, l'Intimé n'était pas fondé à se pourvoir par une action générale, en nullité, en pétition d'hérédité, en confection d'inventaire et en reddition de compte, et que le jugement de la Cour Supérieure, qui avait octroyé à l'Intimé les conclusions de sa demande, était erroné.

Les faits de cette cause et les prétentions des parties sont rapportés suprà, p. 347.

Sir L. H. La Fontaine, Bt., Juge en Chef :

Après une longue enquête, jugement fut rendu *au mérite* par la Cour Supérieure, le 5 septembre 1855, par lequel jugement, la cour " déclare l'inventaire du 31 août 1830, et les actes du " 27 avril 1831, c'est-à-dire, le transport du Demandeur à " Carrier, du 7 décembre 1839, le transport par William A. Motz " à Carrier, du 30 avril 1841, le règlement de tous comptes " entre le Demandeur et Carrier, nuls et rescindés, et remet le " Demandeur ès dits noms aux mêmes état et droits que s'ils " n'eussent pas été passés, sauf à rendre compte de ce qui a " été reçu par lui, ou ceux aux droits desquels il s'agit, avec " l'intérêt jusqu'au décès de Joseph Carrier ; condamne la Défen-

" deresse, ès qualités mentionnées en la déclaration, à rendre " au Demandeur, sous quatre mois de la signification du " présent jugement, un compte bon et fidèle et sous serment " de la gestion de Joseph Carrier, des biens appartenant à " James Motz, William Andrew Motz et Catherine Motz, y " compris le compte des biens meubles et immeubles dépen- " dants de la succession de Christiana McPhee, comprenant " tant ceux qui lui étaient propres, que ceux dépendants de sa " communauté avec Joseph Carrier, à l'époque du décès de " Christiana McPhee ; ordonne que, pour constater les biens de " la succession et de la communauté avec Joseph Carrier, à " l'époque du décès de Christiana McPhee, il sera procédé, sous " le délai ci-dessus, à en dresser bon et fidèle inventaire, suivant " la loi." Puis le jugement renvoie le Demandeur de cette partie de sa demande qui a rapport au don gratuit, et à la continuation de communauté après le décès de Christiana McPhee ; réserve à faire droit ultérieurement sur les autres conclusions de la déclaration.

Motz n'ayant pas interjeté appel de la partie du jugement qui lui est défavorable, nous n'avons pas à nous occuper de la question du don gratuit, ni de celle de la continuation de communauté. Il y a *chose jugée* à cet égard.

La partie du jugement, qui est favorable au Demandeur est précédée de *considérants* ou *motifs* qui sont fortement et clairement exprimés, je les citerai bientôt. La plupart reposant sur une appréciation de faits, il faut d'abord rechercher si l'appréciation faite par les juges de la cour de première instance, est une appréciation exacte, et, de plus, si elle est de nature à justifier les prétentions du Demandeur.

Le fait principal, celui qui, évidemment, a exercé une grande influence sur la décision dont est appel, est celui qui concerne l'âge du Demandeur, et celui de son frère William Andrew Motz. Quant à l'âge de leur sœur, Catherine Motz, il n'y a aucune difficulté, elle est morte en minorité, et ses frères sont ses héritiers.

James Motz était-il majeur, lors de la tutelle donnée à son frère et sa sœur le 21 aout 1830, par l'ordonnance du juge, rendu sur l'avis du conseil de famille, dont il faisait lui-même partie comme " majeur," et laquelle ordonnance à cette occasion lui décerna la charge de " subrogé tuteur " qu'il accepta.

J'avoue que la solution de cette question n'est pas sans difficultés. Il n'existe pas d'extrait baptistaire de James Motz, qui est né lorsque son père était sergent du " Nova Scotia Fencibles." Il a été produit une lettre des " autorités militaires," d'où il résulte que ce régiment a quitté Halifax, dans la Nouvelle-Ecosse, en mai 1805 pour l'Ile de Terreneuve, et qu'il a continué de faire le service dans cette île jusqu'au 17

juin 1814, jour auquel il s'est embarqué pour le Canada, et où il est arrivé entre le 25 juin et le 24 juillet 1814.

En arrivant à Québec, il paraît que le régiment fut immédiatement dirigé sur Kingston, où arriva aussi en août ou sept. 1814, le 104e régiment. Le nommé Duncan Campbell, entendu comme témoin de la part du Demandeur, en vertu d'une commission rogatoire expédiée à l'Ile du Prince-Edouard, et soldat dans le 104e régiment, nous apprend qu'il avait connu Christiana McPhee avant son mariage avec le sergent John Motz. De ce témoignage, ainsi que de celui de Catherine Murphy, dont il sera parlé bientôt, il résulte que le mariage de Motz avec Christiana McPhee remonte pour le moins à l'année 1805.

Le Demandeur et son frère, William A. Motz, sont nés à Terreneuve. Ils y sont nés de 1805 à 1814. Car ils sont venus en Canada avec le régiment de leur père. En 1815, celui-ci prit auberge sur le marché de la Haute-Ville de Québec. Plusieurs témoins, principalement du nombre des personnes qui fréquentaient cette auberge, lorsqu'elle était tenue par Motz, déposent de leurs âges d'après leurs souvenirs et les impressions que l'apparence de ces enfants avaient pu créer dans leur esprit. Comme on peut bien s'y attendre, ces témoins ne s'accordent pas sur l'âge qu'ils leur assignent. Les uns font naître James Motz en 1809, d'autres en 1810, 1811 et même de 1813 à 1814. L'apparence n'était donc pas un guide bien sûr, d'autant plus que quelques-uns de ces témoins ne peuvent pas jurer que le Demandeur ne soit pas né avant 1809.

Un seul témoin reporte, d'une manière positive, la naissance de James Motz à l'année 1810, au mois d'octobre. C'est Catherine Murphy, de l'Ile du Prince-Edouard, veuve de John Murphy, soldat au même régiment, elle dit même qu'elle a été la marraine du Demandeur. Si son témoignage doit prévaloir, James Motz était encore mineur en 1830. Mais il y a des circonstances bien fortes qui contredisent ce témoignage. Il y a même des actes de famille faits du vivant de la mère du Demandeur, d'où il résulterait que celui-ci était majeur en 1830. Qui peut mieux connaître l'âge d'un enfant, que la mère ? Et si Carrier a été de bonne foi porté à regarder Motz comme né à une époque, de manière à être majeur dès 1830, de qui a-t-il pu acquérir cette connaissance, si ce n'est de la mère, devenue sa femme et cela dans un temps où il était bien indifférent à Carrier que le Demandeur eût un an de plus ou de moins ? Dans l'acte de tutelle du 23 septembre 1823, il est dit que James Motz était âgé d'environ 14 ans, ce qui fait remonter sa naissance à 1809, et le rend majeur en 1830. Au collège de Québec, sur la déclaration que Motz fait lui-même au directeur, le révérend M. Parent, son âge est entré dans un livre

tenu à cette fin, le 1er octobre 1824, comme étant alors âgé de 15 ans et 2 mois, ce qui reporterait sa naissance au moins au mois de juillet 1809, et le ferait majeur à l'époque de la tutelle du 21 août 1830. Qui a pu le porter à déclarer son âge d'une manière si précise, si ce n'est la connaissance qu'il en avait eue de sa mère. Avant de procéder à l'acte de tutelle du 21 août 1830, Motz affirme au notaire Panet, qui lui demande son âge, qu'il est majeur ; et il est, dans cet acte auquel il prend part comme membre du conseil de famille, mentioné comme tel ; il est même nommé subrogé tuteur. Lors de son mariage avec Félicite Drolet, le 3 mai 1831, Motz se dit fils majeur. En présence de ces faits qui ont d'autant plus de force q'ils sont nécessairement le résultat de la foi que naturellement on a dû attacher aux déclarations de la mère sur l'époque de la naissance de son fils, je ne puis faire autrement que d'en venir à la conclusion que le Demandeur devait avoir atteint sa majorité, non-seulement au temps de l'inventaire, mais même lorsqu'il fut nommé subrogé tuteur de son frère et de sa sœur, et que son beau-père, Carrier, était justifiable de le traiter alors comme majeur. L'assentiment de Carrier à la nomination de Motz à la charge de subrogé tuteur est une preuve irréfragable que la croyance de Carrier était sincère, et qu'il était dans la bonne foi lorsqu'il traitait ainsi le Demandeur. En supposant Carrier aussi intelligent qu'on l'a représenté, et en le supposant, comme le donne à entendre l'Intimé, mû par la pensée de frustrer les enfants Motz de leur droit dans la succession de leur mère, son consentement au choix du Demandeur comme subrogé tuteur, s'il le savait mineur, serait inexplicable. Il voulait un légitime contradicteur à l'inventaire qu'il se proposait de faire. Or il devait savoir, pour peu qu'il fût intelligent qu'il n'aurait point ce légitime contradicteur dans la personne d'un subrogé tuteur dont la nomination eût été nulle pour cause de minorité, et qu'il s'exposait par là à perdre tout le bénéfice de cet inventaire.

Quant au témoignage de Catherine Murphy, il est à remarquer que cette femme est bien âgée, et qu'examinée à une époque si éloignée des faits dont elle dépose, elle a pu facilement se tromper et prendre James Motz pour John Motz, son frère, décédé à Terreneuve pendant que le père y était en garnison.

A mes yeux, la majorité de l'Intimé aux époques dont il s'agit, est un fait acquis à la cause de l'Appelante ; ainsi je ne peux pas concourir dans le *considérant* du jugement, qui déclare, en fait, que l'Intimé " était mineur lors du prétendu in-
" ventaire fait à Québec, par le ministère du dit Louis Panet
" et de son confrère, le 31 août 1830, par Joseph Carrier, des
" biens de la communauté d'entre lui et Christiana McPhee,

" ainsi que le 27 avril 1831, date du prétendu transport de " droits successifs par le Demandeur au dit Joseph Carrier par " acte devant Panet et son confrère. "

Au susdit inventaire, l'Intimé était donc un légitime contradicteur, tant pour lui-même que pour son frère et sa sœur. Je ne puis donc pas concourir dans le *considérant* du jugement qui déclare " que le dit inventaire est nul en droit comme fait *sans contradicteur.* "

De plus, Carrier n'ayant jamais été le tuteur de l'Intimé, nul doute que celui-ci, devenu majeur, ne pût traiter avec lui de ses droits dans la succession de sa mère. Cela dispose de la demande en autant qu'elle a rapport au cinquième que Motz réclame de son propre chef.

Quant à l'âge de William Andrew Motz, nul doute qu'il ne fût encore mineur lors de l'inventaire. Mais je suis d'avis que la preuve des faits nous le montre majeur le 7 décembre 1833, date de son transport à Joseph Carrier. D'abord, des témoins qui déposent de l'âge des enfants Motz d'après leur apparence seulement, il est vrai, lorsqu'ils étaient en bas âge, ceux qui assignent l'année 1810 comme devant être l'année de la naissance de James Motz, font remonter la naissance de son frère à l'année 1812. Selon la femme Murphy, Andrew Motz serait né entre octobre 1812, et juin 1813, pendant que cette femme était absente de l'Ile de Terreneuve. Dans l'acte de tutelle du du 23 septembre 1823, il est mentionné comme étant alors âgé de huit ans, ce qui fait également remonter sa naissance à peu près à une époque correspondante de la même année, 1812. D'où je conclus qu'il doit être censé avoir atteint sa majorité quelque temps avant le 7 décembre 1833. Le fait même du transport qu'il consentit à Carrier, ce jour-là, n'est pas sans ajouter une grande force à cette conclusion. Carrier pouvait peut-être ignorer qu'il n'était pas prudent pour un tuteur de traiter avec son pupille, devenu majeur, avant de lui avoir rendu compte ; mais un homme intelligent comme lui ne pouvait pas ignorer qu'il eût été bien imprudent de le faire avec un pupille encore en minorité. On doit être porté à croire qu'il s'en serait bien gardé.

Je suis donc d'opinion que la majorité de William Andrew Motz, à l'époque du transport dont il s'agit, est un fait acquis en preuve à la cause de l'Appelante. Ainsi je ne puis pas concourir dans le *considérant* du jugement qui déclare " que " William Andrew Motz était *mineur*, lors de la cession par " lui faite au dit Joseph Carrier, par acte devant Panet et son " confrère, en date du 7 décembre 1833."

Du reste, dans les circonstances de la cause, il incombait au Demandeur, qui s'était dit majeur, et qui savait que son frère en avait fait de même, aux diverses époques dont il est

question, de présenter une preuve qui ne pût laisser aucun doute sur le fait de leur minorité à ces mêmes époques, en démontrant clairement que leur déclaration de majorité était le résultat de l'erreur ou de quelque autre cause. Assurément, l'on ne saurait prétendre que la preuve sur laquelle le Demandeur s'appuie présente ce caractère.

Avant de procéder plus loin, je dois faire remarquer que, bien que le Demandeur ait allégué, dans sa déclaration, que l'acte de tutelle du 21 août 1830, était nul, à raison d'une tutelle préexistante, il n'a pas cependant pris de conclusion à l'effet de faire prononcer cette nullité. Même plus, dans sa réponse à l'exception de la Défenderesse, il invoque, pour repousser cette exception, cette même qualité de tuteur qu'aurait eue Carrier, et les incapacités légales dont elle frappait celui-ci, quant à tout contrat ou transaction entre lui et ses pupilles. Nous voyons, de plus, cette qualité reconnue par le jugement de la Cour Supérieure, lorsque, dans un des *considérants*, cette cour déclare "que lors des actes respectifs du 27 avril 1831, et 7 " décembre 1833, il n'a été rendu par Joseph Carrier aucun compte " de la tutelle qu'il avait gérée et administrée," lorsqu'ensuite elle condamne ses représentants à rendre au Demandeur un compte de cette *gestion*. Et ce jugement, l'Intimé le défend en entier, et nous en demande la confirmation, tandis que de son côté, la partie adverse, tout en attaquant la condamnation prononcée contre elle, admet cette qualité de tuteur dans la personne de Carrier. Puisque les deux parties s'accordent maintenant sur ce point, cela me dispense d'entrer dans l'examen de la question de la validité ou invalidité de la tutelle qui sert de base au jugement. Cette question, en outre, ne nous est pas soumise, le Demandeur n'ayant pas appelé du jugement qui l'a décidée dans l'affirmative. L'absence de la qualité de tuteur eût privé l'Intimé des principaux moyens de nullité qu'il cherche à faire valoir, et qui sont fondés sur la nature des relations particulières qui existent entre un tuteur et son pupille.

Supposant l'absence d'une reddition de compte de la part de Carrier, cela frapperait-il de nullité, ou plutôt exposerait-il à rescision, l'acte de transport du 27 avril 1831, fait par James Motz à Carrier, celui fait au même Carrier par William Andrew Motz, le 7 décembre 1833, l'acte du 4 juillet 1839, en forme de "compte abrégé" des biens mobiliers et immobiliers de la succession de Catherine Motz, rendu par Carrier au dit William Andrew Motz, et l'acceptation ou ratification d'icelui par acte du même jour, enfin le règlement ou arrêté de compte de tous comptes entre le Demandeur et Carrier, en date du 30 avril 1841 ?

Cette question en suggère naturellement une autre qu'il faut d'abord examiner. Même en supposant que Carrier eût été tu-

teur du Demandeur, qualité que néanmoins il n'a jamais eue, avait-il, dans les circonstances particulières que présente cette instance, un compte à rendre aux enfants Motz ? S'il avait un tel compte à rendre, c'est que ces enfants avaient des biens à administrer du vivant de Carrier, et que celui-ci les a en effet administrés, on doit être censé les avoir administrés pour eux et pour leur profit.

Mais, si les enfants Motz n'avaient pas de biens qui fussent dans cette condition, quel compte Carrier avait-il à leur rendre ? Aucun. Examinons les faits.

D'abord quant à la succession de leur père. Il n'a rien été dévolu aux enfants Motz dans cette succession. Tous les biens qui la composaient sont devenus, par testament, la propriété absolue de leur mère.

Ce qu'ils ont droit de recueillir dans la succession de celle-ci, consiste, pour chacun d'eux, en un cinquième des biens de cette succession, qu'elle leur a légué en propriété par son testament du 24 décembre 1828. Mais Carrier a, sa vie durante, l'usufruit et jouissance de ces trois cinquièmes, en vertu du même testament. Ce n'est qu'à sa mort, et par conséquent à sa succession seulement, que les enfants Motz peuvent demander la possession des biens que leur mère leur a légués, et commencer à en avoir la jouissance à leur profit. Jusque-là l'administration, dont ces biens sont susceptibles, appartient à Carrier, pour son profit seul, et non pour celui des enfants Motz.

Il est établi que ces enfants n'avaient pas d'autres biens qui pûssent tomber sous l'administration d'un tuteur, pro-tuteur ou gardien, selon les termes de la déclaration du Demandeur.

Ainsi, en fait, nulle administration par Carrier pour les enfants Motz, faute de biens à administrer, or, une reddition de compte suppose nécessairement une administration. S'il n'y a pas eu d'administration, si même, comme dans l'espèce actuelle, une telle administration n'était pas possible, il ne peut donc pas y avoir de compte à rendre.

Le moyen de nullité que le Demandeur fonde sur le défaut d'une reddition de compte n'est donc pas soutenable. Du vivant de Carrier, un inventaire des biens de la succession de Christiana McPhee était le seul acte qu'il pût être appelé à faire pour la constatation de ces biens dans l'intérêt des enfants Motz comme légataires de leur mère, en supposant qu'il ne pût invoquer avec effet la clause d'exemption de faire inventaire, portée dans le testament.

Ce qui précède conduit nécessairement à la conclusion que James Motz n'est pas fondé à demander, à raison de l'absence d'une reddition de compte, l'annulation ou rescision des actes dont il s'agit.

" Il suffit," lisons-nous dans le *Dictionaire de Législation de*

Dalloz, "qu'un mineur n'ait d'autre fortune qu'une constitution en " argent payable *à sa majorité*, et n'ait aucun bien à adminis- " trer, pour qu'il n'y ait lieu à aucune reddition de compte tu- " telaire de la part du tuteur, et que, par suite, l'on ne puisse " faire annuler, pour n'avoir pas été précédé d'un tel compte, " le traité passé entre le tuteur et son pupille " (No. 316.)

Cette règle de décision a coutume de prévaloir dans la jurisprudence française, même en présence du texte formel de l'art. 472 du Code Napoléon, qui porte " tout traité qui pourra in- " tervenir entre le tuteur et le mineur devenu majeur, sera nul, " s'il n'a été précédé de la reddition d'un compte détaillé, et de " la remise des pièces justificatives ; le tout constaté par un " récipissé de l'oyant-compte, dix jours au moins avant le " traité. "

Des actes de la nature de ceux dont il s'agit, en supposant qu'ils puissent être attaqués, ne sont pas nuls de plein droit, ils sont seulement annulables ou sujets à rescision. Nul doute que l'action fondée sur leur annulabilité ne dût être portée dans les dix ans. L'Appelante est bien fondée à invoquer cette prescription dans les circonstances de la cause. " Les décharges " de compte de tutelle, quoique données *non visis tabulis, non* " *dispunctis rationibus*, ne peuvent plus être attaquées après " les dix années de leur date, postérieure à la majorité, suivant " les arrêts rapportés par Louet et Brodeau, son annotateur, " sous la lettre T, sommaire 3, ce temps ayant été jugé suffi- " sant pour que le mineur devenu majeur pût examiner s'il " avait été lézé." (1)

" La jurisprudence du Parlement de Paris est que le mineur " doit se pourvoir dans les dix ans de sa majorité, contre la " transaction faite avec son tuteur, avant le compte, et *non* " *visis tabulis*, sinon, qu'il est non recevable après les dix " ans."

Lorsque le Demandeur a porté son action, il s'était écoulé plus de vingt ans depuis son transport à Carrier du 27 avril 1831, plus de dix huit ans depuis celui de William Andrew Motz, qui est du 7 décembre 1833, plus de douze ans depuis le traité fait entre ce dernier et Carrier, le 4 juillet 1839, au sujet de la succession de Catherine Motz ; et il y avait plus de onze ans que le règlement de comptes entre le Demandeur et Carrier avait été fait, ce dernier acte étant du 30 avril 1841, et l'action du Demandeur n'ayant été intentée que dans le mois de juin 1852. Ainsi le Demandeur doit supporter la peine de la faute qu'il a commise de ne s'être pas pourvu en temps utile.

Reste à examiner la question de dol et fraude dont le juge-

(1) Ancien Dénizart, au mot " tutelle," p. 117, n° 103.

ment déclare l'inventaire entaché. C'est une question de fait, laissée en entier à l'appréciation du juge.

Il est peut-être inutile de parler de l'effet que peut avoir la clause d'exemption de faire inventaire, puisque Carrier a jugé à propos d'en faire un qui le lie, de même que si cette clause d'exemption ne se trouvait pas au testament de Christiana McPhee. Je ne suis pas porté à donner à cette exemption un effet aussi absolu que celui qu'on a voulu lui donner. Je ne crois pas que le conjoint qui en est l'objet soit entièrement et pour toujours exempt de faire inventaire.

On invoque la règle que "qui peut le plus, peut le moins," et l'on dit que, puisque d'après nos lois, Christiana McPhee pouvait bien donner à Carrier tous ses biens, propriété comme usufruit, elle pouvait valablement le décharger de l'obligation que la loi impose au survivant de deux conjoints de faire inventaire. Il me semble que c'est là une erreur. C'est précisément parce que Christiana McPhee n'a pas donné tous ses biens en propriété à Carrier, lorsqu'elle pouvait le faire, et qu'elle en a donné une partie à ses enfants, que l'exemption de faire inventaire ne saurait être absolue, de manière à ôter aux enfants, pour l'intérêt desquels la loi a établi cette formalité, tout moyen de se protéger contre l'infidélité du survivant. Quoique, du vivant de Carrier, les enfants n'eussent que la nue propriété, il leur importait beaucoup d'en faire constater la valeur et l'étendue aussitôt que possible après le décès de leur mère, afin de se garantir contre une perte possible, même presque toujours certaine, lorsqu'après un grand nombre d'années, le mineur ou l'héritier n'a plus d'autres moyens que les preuves qui peuvent être établies par la commune renommée, preuves qui, comme l'observe un auteur, sont toujours vagues, incertaines et le plus souvent ruineuses. Les enfants Motz avaient le droit de disposer de cette nue-propriété, même pendant la vie et la jouissance de Carrier, et d'en tirer le plus grand parti possible. Comment auraient-ils pu le faire, sans inventaire, sans constatation préalable de l'étendue de cette propriété ? Je serais donc porté à embrasser l'opinion que, nonobstant la clause d'exemption, les enfants Motz ont conservé le droit d'avoir un inventaire, et que le plus grand effet qu'on pouvait donner à cette clause était celui de soustraire Carrier à l'obligation de faire inventaire, tant que cet inventaire ne lui aurait pas été demandé. On ne saurait, ce me semble, l'étendre au-delà, si l'on veut, comme l'équité du moins l'exige, concilier tous les intérêts existants, sans porter préjudice aux uns ou aux autres. Il n'a pas dû entrer dans la pensée de la testatrice qu'il en fût autrement. Mais, supposant que la clause du testament soit susceptible de produire un effet plus étendu, celui d'une exemption absolue, toujours est-il que l'obligation que Carrier

aurait été ainsi dispensé de remplir, était l'obligation du *conjoint*, et non du *tuteur*. En acceptant après la mort de sa femme, la tutelle de deux de ses enfants, Carrier ne se soumettait-il pas à l'obligation de faire inventaire, par cela seul qu'il était de l'intérêt de ces mineurs que cet inventaire fût fait ? Au reste, il n'est pas nécessaire de porter plus loin l'examen de cette question, puisqu'un inventaire existe ; cela suffit aux fins de cette cause, que Carrier ait lui-même pris l'initiative de son propre mouvement, ou qu'il ne se soit déterminé à faire cet inventaire que parce qu'il lui était demandé par James Motz, tant en son propre nom que comme subrogé tuteur des deux mineurs.

Le considérant du jugement, qui déclare que l'inventaire du 31 août 1830, est " entaché de lésion, dol et fraude, et confond " les biens propres à Christiana McPhee avec ceux de la com- " munauté," est-il un énoncé justifié par les faits tels que la preuve nous les présente ? Il y a deux parties dans cet énoncé, la dernière est vraie en quelque sorte, celle qui a rapport à la confusion des biens. Le premier mari de Christiana McPhee avait laissé des immeubles qui sont devenus des propres à celle-ci, à l'égard de sa communauté avec Carrier. Ils ont été aliénés pendant cette communauté qui en a reçu le prix. Cette aliénation donnait donc lieu à reprise ou prélèvement, en faveur des représentants de Christiana McPhee, lors de la dissolution de la communauté. Dans l'inventaire, et, par suite, dans le compte rendu par Carrier pour servir de base à ses transactions avec les enfants Motz, le prix de ces propres se trouverait, par le fait, comme ayant été versé dans la communauté, selon les énoncés du jugement, avoir été porté et partagé comme faisant partie de l'actif de cette communauté. En ce sens, il y a eu confusion ; confusion née sans doute, ou de l'erreur du notaire, ou de celle de Carrier, qui a pu croire qu'une fois ces propres convertis en argent, la communauté en profitait. Par suite de cette erreur, Carrier se trouve avoir reçu dans sa part, comme conjoint, au préjudice de la succession de sa femme, la *moitié* du prix des propres ainsi aliénés, tandis qu'il n'aurait dû en toucher qu'un cinquième à lui légué en propriété ; et que des quatre autres cinquièmes dont il avait l'usufruit seulement, un appartenait en propriété à son propre fils, et les trois autres aux enfants Motz. L'opération qui a eu cette erreur pour base a porté préjudice à ces derniers, en ce que le prélèvement, auquel ils auraient eu droit, n'a pas été fait. Mais cette erreur, par cela même qu'elle était une erreur grossière, était bien facile à découvrir, surtout par une personne qui, comme l'Intimé, appartient à la profession d'avocat. Elle était de nature à donner lieu à une demande en rectification, mais non à une demande en resci-

sion en entier de l'inventaire et du compte rendu. Cette rectification, lorsqu'elle se fera, portera peut-être un préjudice notable à la succecsion de Carrier, puisque, selon les circonstances, cette succession pourra être exposée à payer une seconde fois aux enfants Motz partie de leurs parts dans la reprise à faire du prix des propres aliénés, les enfants Motz se trouvant avoir déjà reçu de fait cette même partie par la première opération. Dans une erreur aussi facile à découvrir, et dont la rectification pouvait même injustement porter préjudice à Carrier ou à sa succession, ainsi que je viens de l'indiquer, je ne peux pas voir, d'après les circonstances du procès, un fait de dol et de fraude qui puisse justifier l'imputation qui a été faite, et entacher de nullité tout l'inventaire dont il s'agit. La Cour Supérieure elle-même n'aurait peut-être pas accueilli cette imputation, si elle n'eût eu à considérer que le fait isolé auquel elle se rapporte, et non la question plus grave de la minorité des enfants Motz. Il est évident que la conclusion à laquelle elle en est venue sur ce dernier point, celle que le Demandeur et son frère étaient encore mineurs à certaines époques déjà spécifiées, a exercé une grande influence sur tout le reste du jugement. En effet, le fait connu de la minorité de James Motz lors de son transport à Carrier, de sa nomination à la charge de subrogé tuteur, et de la confection de l'inventaire, eût été un fait qui, en excluant toute idée de bonne foi de la part de Carrier, l'aurait justement exposé à l'imputation de dol et de fraude que le Demandeur cherche à faire peser sur lui aujourd'hui. Cette conclusion, relative à l'âge de James Motz, me paraissant donc celle qui, étant prise pour base de son jugement, a conduit la Cour Supérieure à accueillir l'accusation de dol et de fraude, il s'en suit que la conclusion contraire que j'ai formée sur l'âge du Demandeur et celui de son frère, doit me faire rejeter cette accusation. Que le Demandeur exerce, s'il est encore à temps, l'action spéciale en rectification. Qu'il l'exerce de même à l'égard de la créance Scott, si elle a été réellement payée à Carrier, ou si la solvabilité du débiteur peut être prouvée de manière à obliger Carrier à en rendre compte. L'omission de mention de cette créance ne doit pas entraîner l'annulation de l'inventaire, pas plus que le doit faire semblable omission de prétendues créances de quelques personnes indiquées dans la cause, que, d'après la preuve, nous devons regarder comme étant notoirement insolvables dès le temps du décès de Christiana McPhee. Cette insolvabilité notoire rend compte de l'omission de telles créances ; et quoiqu'il eût été sans doute mieux d'en faire mention, je ne peux pas voir, dans cette omission, un fait qui justifie l'imputation de dol et de fraude dont on prétend l'inventaire entaché. Si ces personnes étaient ainsi insolvables, l'omission n'a porté aucun

préjudice aux enfants Motz. Si, au contraire, elles étaient solvables, l'inventaire ne privait pas ces enfants de leur recours, tout en subsistant pour ce qu'il contenait.

S'il y a des erreurs de calcul, et il paraît en effet y en avoir quelques-unes, elles peuvent donner lieu à une demande en rectification, mais elles ne frappent de nullité ni l'inventaire, ni les traités que Carrier a faits avec le Demandeur et son frère. Il en devait être de même de quelques effets de la communauté, que le Demandeur, quoique présent lui-même à l'inventaire, prétend néanmoins avoir été estimés bien au-dessous de leur valeur, tels qu'une montre d'or, sa chaîne et une tabatière.

Le Demandeur, pour justifier l'imputation de dol et de fraude, a prétendu que la communauté était au décès de sa mère, beaucoup plus opulente que l'inventaire ne la présentait. Rien n'est plus vague, plus incertain, que la preuve qu'il a faite à cet égard. Motz, père, à sa sortie du régiment en 1815, prend auberge sur le marché de la haute-ville de Québec; il ne la tient que pendant quatre ans, étant décédé en 1819. Dans la même année, sa veuve épouse Joseph Carrier, garçon boucher, lequel continue à tenir la même auberge qui, naturellement, était fréquentée par ses anciens compagnons de métier et par les charretiers qui stationnent sur la place publique. C'est parmi ces personnes que l'on a recruté les principaux témoins pour établir le chiffre des richesses de la communauté, au moyen de la commune renommée. Notre embarras serait bien grand, si nous avions à fixer ce chiffre d'après les opinions si diverses de ces témoins. Suivant les uns, la fortune de Christiana McPhee aurait été fabuleuse ; suivant d'autres, elle et son mari faisaient un commerce prospère, il est vrai, mais modeste. Il paraît que le jeune garçon boucher aimait à se vanter, et à grossir, dans ses conversations, avec ses amis, les richesses de la veuve qu'il avait épousée. Il disait à l'un : j'ai pris une femme riche, j'ai trouvé " une table bien mise " ; et, de pareils propos, il paraît que ses amis ont conclu que Carrier devait nager dans l'or et l'argent, et qu'à la mort de sa femme, arrivée en 1829, la communauté devait posséder des milliers de louis, si ce n'est des millions.

Ajoutons à ce qui précède, deux autres considérations : la première que Carrier n'est plus, et qu'il est maintenant représenté par une personne qui a été étrangère à l'inventaire dont il s'agit, qui même, et cela est bien probable, n'a jamais vu les effets de la communauté d'entre Carrier et sa première femme, ni connu les affaires de cette communauté ; la deuxième, c'est qu'avant l'inventaire, le Demandeur avait lui-même tenu les livres de Carrier, et qu'il devait connaître ou avait eu les moyens de connaître l'état de la fortune qu'avait laissée sa mère, aussi bien, si ce n'est même mieux, que Carrier lui-même.

Au premier cas, si l'inventaire du 31 août 1830, est annulé, quel moyen aura l'Appelante de faire le bon et loyal inventaire qu'on lui demande aujourd'hui ? Ne serait-elle pas de toute nécessité contrainte à prendre, pour base du nouvel inventaire le contenu de l'ancien, tant pour ce qui regarde la nature et la qualité des effets à inventorier, que pour ce qui regarde la valeur que ces effets pouvaient avoir ? Ne serait-ce pas, dans le fait, une simple répétition du premier inventaire qu'elle aurait à présenter en obéissance au jugement qui la condamne à faire ce nouvel inventaire ? Il est vrai qu'elle pourait y ajouter la mention de la reprise à faire à raison de l'aliénation des propres de Christiana McPhee, et la mention de créances désespérées à raison de l'insolvabilité notoire des débiteurs, si toutefois ces créances existaient encore au temps de la dissolution de la communauté. Mais le premier inventaire, faute de cette mention, ne privait pas le Demandeur, ni son frère, ni sa sœur, de l'exercice des droits qui pouvaient leur compéter à cet égard. Ils avaient l'action en rectification ou réformation. Assurément après le long temps qui s'est écoulé, et dans la situation particulière où se trouve l'Appelante, situation qui lui fait presqu'une impossibilité de satisfaire au jugement, l'équité exige que le premier inventaire soit maintenu, et qu'on reconnaisse qu'après cet inventaire la seule action qui restait aux enfants Motz était l'action spéciale que j'ai indiquée. Cette raison d'équité se présente avec d'autant plus de force qu'elle s'appuie encore sur la deuxième considération que j'ai posée plus haut, la connaissance préalable que le Demandeur avait personnellement eue, on avait été à même d'avoir, de l'état de la succession de sa mère, lorsque l'inventaire fut fait ; et, si l'on réfléchit qu'étant majeur et subrogé tuteur de son frère et de sa sœur, il a été présent à cet inventaire comme légitime contradicteur, que de plus, il n'était pas le seul légitime contradicteur présent, qu'il y en avait un autre, le subrogé tuteur de Carrier, fils, frère utérin du Demandeur, il me semble que tout concourt à repousser l'imputation de dol et de fraude, et à fa re regarder l'inventaire comme sincère, jusqu'à preuve, mais preuve claire ; précise et évidente du contraire. Or cette preuve n'existe pas dans la procédure, si ce n'est pour ce qui regarde quelques objets. Et encore ne s'agit-il que de quelques omissions ou quelques erreurs de calcul, qui ne devaient donner lieu qu'à une action spéciale pour les rectifier.

La circonstance que l'huissier priseur Williams, qui a été employé à faire l'évaluation des effets portés en l'inventaire, n'a pas été assermenté par le notaire Panet, n'est pas un fait qui frappe cet inventaire de nullité ; d'autant plus qu'il est prouvé que l'usage, à Québec, est d'admettre les huissiers, en vertu de leur serment d'office, à faire la prisée aux inventai-

res. Je pense bien que, si le Demandeur n'avait eu à invoquer que ce seul fait isolé, son action n'aurait jamais été portée.

Le Demandeur a eu tort de prétendre que l'action en rescision ne pouvait être ouverte que par la mort de Carrier. Son action pour se faire mettre en possession des biens légués en propriété à lui et aux deux autres enfants Motz, et dont Carrier avait l'usufruit, ne pouvait être ouverte qu'à cette époque. Mais il n'en était pas de même de l'action en rescision qui pouvait lui compéter à l'égard de l'inventaire et des autres actes qu'il attaque. Cette action était ouverte du moment que ces actes ont été passés.

Je n'ai plus qu'une observation à présenter. N'est-il pas étrange que le Demandeur ait attendu la mort de son beau-père pour porter l'action en nullité et en rescision dont il s'agit ? Carrier était seul capable de défendre à cette action, en connaissance de cause : lui seul et le Demandeur pouvaient expliquer ce qui s'est passé entre eux. L'on a dit, pour soustraire Motz aux reproches mérités que lui fait à cet égard la veuve de Carrier, que celui-ci lui avait souvent promis de lui donner, dans sa succession une part égale à celle de ses autres enfants, et qu'il craignait de perdre la chance de réaliser le bénéfice de cette promesse, s'il mécontentait son beau-père en intentant de son vivant une action semblable à celle qu'il vient de diriger contre sa veuve. C'est une bien faible excuse de la part du Demandeur, surtout lorsqu'on voit qu'il n'a pas craint, en 1845, de s'exposer au risque de mécontenter Carrier, en intentant une action contre lui pour la chétive somme de £300, moitié du prétendu don gratuit dont il a été question en cette cause. Il eût certainement mieux valu pour lui de ne présenter aucune excuse, que d'en offrir une qui est contredite par sa propre conduite.

CARON, J. : L'exception à la forme est fondée sur ce que le Demandeur a cumulé dans son action, trois différentes demandes incompatibles : 1° rescision de certains actes ; 2° reddition de compte ; 3° condamnation pour £300, montant du don gratuit sur acte distinct.

Au fond, cette exception ne me paraît pas fondée ; les diverses causes d'action me paraissent compatibles, résultant de la même source, et, même il me paraît qu'il était nécessaire de les inclure toutes dans la même action, afin de parvenir à régler finalement les difficultés de famille existant entre les parties, et que l'action avait pour but de terminer.

Mais je pense que la Cour Inférieure a mal jugé en renvoyant cette exception sur motion, pour le motif qu'elle avait été produite trop tard. Je suis d'avis que, d'après la vingt-cinquième section de l'acte de judicature, le Défendeur n'est pas tenu de filer ses exceptions à la forme ou autres exceptions

préliminaires, avant l'expiration de huit jours, et avant la demande qui lui en doit être faite, de la même manière que les autres défenses, nulle distinction n'étant faite par la loi entre les unes et les autres ; elles peuvent être produites en même temps que les autres, ainsi que l'a décidé cette cour dans la cause *The Bristish Fire Assurance Company* vs. *M'Craigh.* Or, la Cour Inférieure ayant accordé à la Défenderesse un délai pour produire ses défenses, le délai s'étendait aux exceptions préliminaires comme aux autres. Et à l'expiration de ce délai, la Défenderesse était, comme avant, en droit de filer ensemble toutes ses défenses, celles à la forme comme les autres. Je crois donc le jugement de la Cour Inférieure erroné sous ce rapport. Mais, comme finalement, la Défenderesse ne gagnerait rien par sa défense à la forme, qui au mérite est mal fondée, ce serait inutile de renverser ce jugement, je le laisserai subsister.

La défense en droit a été déboutée par la Cour Inférieure, par jugement du 14 mars 1853. Ce jugement me paraît correct. Les moyens qui y sont invoqués forment de bonnes réponses à l'action ; mais elles sont des fins de non-recevoir qu'il appartenait à la Défenderesse de faire valoir, ainsi qu'elle l'a fait par son exception. Mais qu'il n'était pas nécessaire au Demandeur d'alléguer en son action. Ainsi la défense en droit a été correctement renvoyée, et le jugement du 14 mars 1853 doit être confirmé.

C'est sur l'exception de la Défenderesse, et la réponse spéciale qu'y a faite le Demandeur, que roule le mérite de la contestation entre les parties.

Le Demandeur se donne trois qualités en son action ; il poursuit d'abord en son propre nom, ensuite comme cessionnaire de son frère, et enfin comme héritier de sa sœur. L'origine de ces réclamations, dans les trois qualités, est le testament de sa mère, Christiana McPhee, en date du 24 décembre 1828.

D'après le testament, l'usufruit de tous les biens de Christiana McPhee est légué à Joseph Carrier, son second mari, qui a droit d'en jouir sa vie durante, sans exception aucune, et sans être tenu d'en faire aucun inventaire ; obligation dont il est spécialement exempté par une clause du testament. Quant à la propriété des biens, tant mobiliers qu'immobiliers, elle est divisée en cinq parts égales, trois desquelles sont données aux trois enfants issus de son premier mariage ; une autre part au fils qu'elle avait eu de son second mariage, et la cinquième à Joseph Carrier, qui, partant, est usufruitier du tout, et légataire particulier en propriété d'un cinquième au total.

En vertu de ce testament qui n'est pas contesté, et qui doit faire la loi entre les parties à ce procès, les enfants Motz n'avaient rien à demander à Carrier, ce dernier ne leur devait

rien du tout comme légataire, soit en usufruit, soit en propriété, il n'était tenu envers eux à aucune obligation quelconque.

Ayant droit de jouir de tout, sa vie durante, de son vivant il n'était pas tenu de rendre compte, ni de faire inventaire, puisqu'il en était exempté. (1)

Je pense que cette clause est parfaitement légale, que l'on a eu tort de dire que Carrier ne pouvait pas être exempté de faire inventaire, soit comme usufruitier, soit comme commun en biens.

Tout ce qu'on peut exiger, c'est qu'il souffre que l'inventaire soit fait aux dépens du propriétaire.

Si ce qui précède est correct, il suit que, tant que Carrier a vécu, il n'était tenu ni de faire inventaire, ni de rendre compte de ce qui lui était légué en usufruit.

Cela étant, voyons quels sont les droits du Demandeur, poursuivant en sa qualité de légataire en son propre et privé nom.

Comme tel, après le décès de Carrier, il avait droit, d'après le testament, de réclamer un cinquième au total des biens délaissés par sa mère, tels que les laisserait Carrier à son propre décès.

Carrier qui avait l'usufruit des biens, et qui n'était pas obligé d'en faire inventaire, n'a jamais été tuteur du Demandeur, il est établi par la preuve dans la cause qu'avant le décès de sa mère, le Demandeur n'avait aucun bien quelconque ; qu'il est resté dans cet état, n'ayant absolument rien, tant qu'il a été mineur, que tout ce à quoi il pouvait prétendre, était ce qui lui avait été légué par sa mère ; que, partant, tant qu'il a été mineur, il n'avait aucuns biens dont Carrier pût avoir la gestion et administration.

Carrier, qui a élevé le Demandeur, peut bien être regardé comme ayant eu la garde de sa personne, mais il n'a pu gérer ses biens, ni, partant, être tenu de lui rendre aucun compte. Ainsi, tant que Carrier a vécu (et il n'est mort qu'en 1851), le Demandeur ne pouvait rien lui demander, ni inventaire, ni reddition de compte : son droit ne prenant ouverture que par le décès de Carrier ; c'est alors seulement qu'il pouvait demander à sa succession le cinquième qui lui avait été légué, lequel, à défaut d'inventaire, aurait pu et dû être constaté en la manière usitée. A cette époque seulement, le Demandeur avait action contre les représentants de Carrier, pour les forcer à faire inventaire, et adopter les autres mesures nécessaires peur se faire livrer ce qui lui revenait dans la succession de sa mère.

Cette action ainsi portée n'aurait pas manqué de réussir, à moins que, de la part de la défense, il n'eût été démontré que le Demandeur avait renoncé légalement à ses prétentions.

(1) V. art. 463 C. C.

Ceci nous amène à examiner la validité des divers actes que le Demandeur a faits avec Joseph Carrier, de son vivant, actes que la Défenderesse lui oppose; que lui prétend être nuls, et dont il demande l'annulation par son action même, et avant que ces actes lui aient été opposés.

Ces actes sont: 1° l'inventaire du 31 août 1830; cet acte (Panet, not.) est fait par Jos. Carrier, en son propre nom, comme commun en biens avec feue Christiana McPhee, aussi comme tuteur à Jos. Carrier, son fils, et à William Andrew et à Catherine Motz, en présence du Demandeur, agissant comme subrogé tuteur à son frère et à sa sœur, et aussi en présence de Dion, subrogé tuteur à Jos. Carrier, fils. Cet inventaire, qui n'est pas regardé par l'Appelante comme nécessaire, est cependant, de l'aveu de toutes les parties, le document, ou l'état, sur lequel a été établi le montant dont elles dont ensuite convenues dans les diverses transactions qui ont été faites entre elles.

De la part de l'Appelante, il est prétendu qu'il est suffisant à cet effet, et que peu importe qu'il soit revêtu de toutes les formalités voulues; tandis que, de la part de l'Intimé, il est prétendu que cet acte était indispensable; que, cependant, il est nul et doit être regardé comme son avenu: 1° parce qu'il a été fait sans légitime contradicteur; 2° parce qu'il n'est pas accompagné de pièces justificatives; 3° parce que des recels et des omissions frauduleuses y ont été faits.

De ces trois objections, la seule qui serait de nature à causer la nullité de l'inventaire, serait le défaut de légitime contradicteur; car il n'y a aucune loi qui dise qu'il faille, à peine de nullité, que les pièces et papiers dépendants d'une communauté, soient produits et insérés dans l'inventaire des biens qui en est fait; l'omission de la mention des pièces et papiers pouvant, d'après les circonstances, faire le sujet d'une demande en nullité de cet inventaire; mais ce ne serait que, sous des circonstances qui n'ont été ni alléguées ni prouvées dans le cas actuel.

Quant aux omissions et recels dont se plaint le Demandeur, ils n'emportent pas non plus la nullité de l'inventaire, seulement, ils assujétissent la partie qui s'en rend coupable aux peines des recels, qui sont bien différentes, et dont, dans l'espèce, l'on ne demande pas l'application.

Quant à l'absence de légitime contradicteur, elle constitue, sans aucun doute, une cause de nullité absolue en faveur des mineurs qui y sont intéressés, et, quant à eux, ou à celui qui les représentent, il suffirait de montrer que, de fait, il n'y a pas eu, de leur part, de légitime contradicteur, légalement qualifié à les représenter, pour que cet inventaire fût regardé, à toutes fins quelconques, comme nul; c'est une question de fait, sur laquelle il faudra revenir dans un instant: pour le moment

comme il ne s'agit que du Demandeur, poursuivant en son propre nom, la chose est sans importance ; quant à lui, il a assisté à cet inventaire comme majeur, y représentant ses propres intérêts. Mais l'on prétend que lui aussi était encore mineur ; si c'est le cas, quant à lui, ou plutôt, quant à l'intérêt qu'il a pu avoir à cet inventaire en son propre nom, il peut le traiter comme nul ou en demander la nullité.

La question de savoir, si à l'époque du 31 août 1830, James Motz était ou non majeur, est dans la cause une question de fait sur laquelle, d'après la preuve, il est très difficile de se prononcer ; rien de positif n'est prouvé ni de part ni d'autre sur le sujet : tout est conjecture et supposition. Ce qui est certain, c'est que, s'il n'était pas majeur, il ne s'en manquait guère. Les déclarations de majorité que le Demandeur a faites à plusieurs reprises, ne le lient pas, il est vrai ; mais pour éviter les conséquences de ces déclarations et se mettre à couvert des suites qu'elles peuvent avoir, il aurait fallu établir d'une manière claire et satisfaisante, que les déclarations avaient été faites par erreur et contre la vérité. Or, de toute la preuve prise ensemble, il ne résulte pas, suivant moi une conviction suffisante que ces déclarations n'étaient pas correctes, ni véritables. Après s'être dit et représenté majeur, c'était au Demandeur à prouver la minorité qu'il allègue ; je ne suis pas satisfait qu'il l'ait fait : pour ces raisons, je ne crois pas lui faire injustice en le jugeant suivant ses déclarations, et en le regardant comme majeur lors de l'inventaire, et je suis d'avis que, quant à lui, il n'était besoin ni de tuteur, ni de subrogé tuteur : il était, pour sa part, un légitime contradicteur suffisant et légal.

De ce qui précède, je conclus que le Demandeur poursuivant en son propre nom, et en sa qualité personnelle, n'a pas droit d'obtenir que l'inventaire du 31 août 1830, soit déclaré nul pour les raisons qu'il invoque.

Mais admettant que, pour les motifs donnés par la Cour Inférieure, l'inventaire en question fut indispensable, et que pour ceux fournis par le Demandeur, celui fait soit radicalement nul, il faut examiner quel est l'effet, dans ce cas, des actes faits entre le Demandeur et Jos. Carrier, l'un en date du 27 avril 1831, et l'autre du 13 août 1841.

Par le premier de ces actes, le Demandeur Motz fait cession à Carrier, son beau père, de tous ses droits mobiliers et immobiliers dans la succession de John Motz et de Christiana McPhee, ses père et mère, à la décharge par Carrier de payer les dettes des dites successions, et en outre, en considération de la somme de £505 6 4, que le Demandeur reconnaît avoir reçue de Carrier.

De la part du Demandeur, il est prétendu que cet acte est

nul et il en demande l'annulation : 1° parce que le dit Joseph Carrier, n'ayant pas rendu compte au dit Demandeur, ne pouvait légalement transiger avec lui.

2° Parce que le prix convenu pour cette transaction, était basé sur des calculs faux et erronés, faits entre un tuteur et son pupille, sans inventaire, sans reddition de compte, sans examen ni remise de pièces justificatives ;

3° Parce que, lorsque cet acte fut passé, le Demandeur était encore mineur.

Quant à la prétention que Carrier n'avait pas rendu compte, il a déjà été établi qu'à l'époque où cet acte était passé, Carrier avait droit de jouir de tous les biens de sa défunte épouse, de la part qui devait revenir au Demandeur, comme, du reste, le testament lui donnait l'usufruit du tout, tant qu'il vivrait.

Au reste, il faut bien remarquer que Carrier n'avait pas été tuteur du Demandeur, et n'avait eu la gestion d'aucuns biens qui lui appartinssent. Donc, à l'époque en question, il ne lui devait aucun compte, et ne pouvait être regardé comme étant en défaut pour ne lui en avoir pas rendu un. Non seulement il n'était pas sous ce rapport en défaut, mais il lui était impossible de rendre aucun compte. Cette raison est donc d'aucune valeur.

Quant à la prétention que le prix convenu par la transaction était fondée sur des calculs faux et erronés, c'est-à-dire, que la part du Demandeur dans la succession de sa mère était fixée sur le montant établi par l'inventaire du 31 août 1830, et par l'état de compte y joint ; que cet inventaire et compte étaient erronés et faux, et que partant une transaction qui était fondée sur de pareilles bases devait de nécessité être nulle et traitée comme telle.

Sans entrer dans la discussion de la vérité de cette assertion, en admettant même qu'en fait elle serait correcte, il ne s'ensuivrait pas que l'acte dont il s'agit fût nul et dût être déclaré tel. Cette transaction n'était pas, ainsi qu'on le prétend, entre un tuteur et son pupille, et partant il est faux, que, dans les circonstances, cette transaction dût, de nécessité, pour être valable, être précédée d'une reddition de compte revêtue de toutes les formalités requises pour la validité des comptes de tutelle.

Entre Carrier et le Demandeur, entre lesquels n'existaient pas les rapports de tuteur et de pupille, si le prix dont il a été convenu entre eux dans le dit acte est fondé sur l'erreur, et même sur la fraude, le Demandeur pouvait peut-être avoir une action pour faire rectifier ces erreurs, et se faire restituer contre les fraudes commises à son préjudice, mais il ne lui compétait pas, même pour les raisons qu'il allègue, de demander

la nullité de l'acte en entier: cet acte du reste n'ayant pas été passé sous les circonstances prétendues par le Demandeur.

Quant à la prétention que, lors de la passation du dit acte, le Demandeur était encore mineur, l'on peut sous ce rapport référer à ce qui a été dit plus haut, en parlant de l'inventaire, sur le sujet de la minorité alléguée par le Demandeur.

Dans le second des dits actes (celui du 30 août 1841), fait encore entre Joseph Carrier et le Demandeur, se trouve la clause suivante, par laquelle le Demandeur " confirme et " approuve le compte rendu par Joseph Carrier, de la suc- " cession mobilière et immobilière de Catherine Motz, le 4 " juillet 1839; voulant et entendant qu'il soit exécuté avec " lui, quant à sa part, suivant sa forme et teneur: et, en con- " séquence du règlement et arrêté de compte ci-dessus, tient " Joseph Carrier, et tous qu'il appartiendra, quitte du reliquat " du dit compte, et de rendre aucun autre compte quelconque, " déchargeant Joseph Carrier de toutes demandes et récla- " mations à la succession mobilière et immobilière de Cathe- " rine Motz, et de toutes autres demandes et réclamations " quelconques qu'il pourrait avoir contre lui jusqu'à ce jour. "

Le Demandeur dit dans son action, que cet acte est aussi nul pour les mêmes raisons que celles invoquées contre celui dont il vient d'être question.

Pour ne parler dans le moment de cet acte, qu'en autant qu'il a rapport à la demande de l'Intimé en son propre et privé nom, il suffit de dire ici que, quant à la minorité, elle ne peut du moins pas être invoquée contre cet acte de 1841, puisque, sans contredit, il y avait bien à peu près dix ans, que le Demandeur était arrivé à sa majorité, lorsqu'il faisait la transaction par laquelle il renonçait à toutes demandes quelconques qu'il pouvait avoir en son propre et privé nom contre Carrier, jusqu'à la date du dit acte.

Restent donc contre la validité de cet acte, le défaut de compte rendu et remise de pièces, et les erreurs et omissions dont serait entaché l'inventaire pour les causes déjà énoncées.

Tout ce qui a été dit en réponse aux différentes objections au sujet de l'acte du mois d'avril 1831, s'applique à celui de 1841; lequel me paraît valable, en autant du moins que le Demandeur y a stipulé au sujet de sa propre part dans la succession de sa mère, abstraction faite pour le moment des stipulations qu'il y a faites à l'égard de la succession de sa sœur. Ces deux qualités devraient être tenues distinctes et séparées, et traitées à part l'une de l'autre, vu que dans une qualité il pourrait avoir à invoquer contre cet acte des objections qui ne lui compéteraient dans l'autre.

Si donc cet acte n'est pas nul, s'il lie le Demandeur en qualité de légataire de sa mère, il en résulte que l'on doit y trou-

ver une confirmation et ratification de tout ce qu'il avait fait précédemment en cette qualité, et une renonciation au droit de se plaindre et se prévaloir des défauts de forme, et autres qui pouvaient se trouver dans les actes précédents qu'il avait faits avec le dit Joseph Carrier, quant à cette portion de ses droits.

Ainsi, par cet acte d'avril 1841, le Demandeur ratifie l'inventaire du 31 août 1830, auquel il avait été présent, et dans lequel il avait agi comme subrogé tuteur à son frère et à sa sœur encore mineurs. Il ratifie également l'acte de transport du 27 avril 1831.

Mais le Demandeur a prétendu que ces actes n'étaient pas ratifiables ; qu'ils étaient dans le principe nuls radicalement et de plein droit, et qu'aucune ratification ne les pouvait valider. Cette prétention est mal fondée pour les raisons déjà émises. Ces actes, en les supposant entachés des vices et défauts prétendus, ne seraient pas frappés de nullité absolue, ils seraient tout au plus annulables ; car, en supposant l'inventaire en question et le compte qui l'accompagne, comme étant nécessaires, que Joseph Carrier fût tenu de faire inventaire et de rendre compte au Demandeur (ce qui pourtant n'est pas le cas), dans cette supposition, les omissions, les erreurs, le recels, la fraude même ne rendraient pas ces documents nuls, mais annulables seulement. Pour faire bonne cette proposition qui a été fortement combattue par le Demandeur, qui prétend que les ratifications invoquées par l'Appelante ne lui étaient d'aucun service, ne pouvant faire vivre des actes qui n'avaient jamais existé, il est bon de référer à quelques autorités.

L'ordonnance de 1667, art. 21, du titre 29, dit : " Ne sera " ci-après procédé à la revision d'aucun compte ; mais s'il a y " des erreurs, omissions de recette ou faux emplois, les parties " pourront en former leur demande ou interjeter appel de la " clôture du compte, et plaider leurs prétendus griefs à l'au- " dience. "

En consultant Serpillon, sur cet article, aux pages 549 et 550, l'on verra que le sens de cette disposition est que le compte même de tutelle, qui contient des *erreurs*, omissions de recette et *faux* emplois, n'est pas pour cela nul en entier ; seulement la partie lésée a son action en justice pour faire rectifier ces erreurs, et suppléer les omissions, etc.

Voir, sur le même article, Boutaric, qui est encore à ce sujet plus positif que Serpillon : " La surprise et le dol qui seraient " reconnus avoir été exercés par le tuteur, relativement à cer- " tains articles du compte ; ne donnent pas lieu à la rescision " de tout le compte ; il en resulte seulement, même dans " les nouveaux principes, une action en rectification des erreurs " omissions, faux ou doubles emplois qui existeraient dans le

" compte, et il n'y a lieu à la rescision du compte en entier " que lorsque les faits de dol se rattachent à la signature des " parties qui termine l'acte et lui donne l'être. " (1)

Ces autorités et nombre d'autres établissent que les comptes de tutelle et autres actes, dans lesquels se trouveraient la surprise, la fraude, les recels et autres défauts préjudiciables aux mineurs, ne les rendent pas nuls radicalement, et ne les empêchent pas de pouvoir valablement être ratifiés par le mineur devenu majeur.

Pour ces raisons, sans qu'il soit, pour le moment, nécessaire de parler de la prescription qui est un des moyens invoqués par la défense, je crois devoir conclure que quels que puissent être les droits du Demandeur, en ses qualités de cessionnaire de son frère, d'héritier de sa sœur, il n'en a aucuns en son propre et privé nom, en sa qualité de légataire de sa mère, et que, partant, cette partie du jugement de la Cour Inférieure qui lui reconnaît de tels droits est erronée et doit être réformée.

Mais, comme héritier de sa sœur, le Demandeur réclame aussi, par son action, la moitié du cinquième qui lui avait été légué par le testament de leur mère.

Le testament, sur lequel repose cette réclamation, est en date du 24 décembre 1828 ; la testatrice est décédée le 15 avril 1829. Sa fille, Catherine, dont le Demandeur est héritier, pour moitié, est morte le 6 décembre 1837 en minorité et sans testament. Joseph Carrier est, lui, décédé le 5 septembre 1851 ; ainsi, lors de son décès, Catherine Motz, ayant survécu à sa mère, avait droit au cinquième que cette dernière lui avait légué ; mais, comme elle est morte avant Carrier, sont droit, lors de son décès, n'était pas encore ouvert, la jouissance de ce cinquième, comme de tout le reste, appartenait à ce dernier tant qu'il vivrait. Ainsi, quoique Carrier eût été nommé tuteur à cette mineure, le 21 août 1830, et que, partant, lorsqu'elle est décédée, il eût été, de fait, son tuteur pendant plus de sept ans, il n'avait cependant, comme tel, ni géré ni administré, aucuns biens de quelque espèce que ce fût, appartenant à la mineure, étant clairement établi, qu'elle n'en avait pas d'autres que ceux qui lui avaient été légués par sa mère, et dont Carrier avait l'usufruit, ainsi, s'il est vrai que la clause du testament qui exemptait Carrier de l'obligation de faire inventaire, était valable, comme je pense avoir fait voir qu'elle l'était, il s'ensuit que, tant qu'a vécu Catherine Motz, Carrier n'a été tenu à son égard à aucune obligation résultant du testament ou de sa qualite du tuteur : ni comme légataire, ni comme tu-

(1) 7 Dict. de Législ., *verbo* Tutelle, p. 234, nº 290. " Quand le mineur a ratifié en majorité, il n'est restitué." Restitution, nº 17, p. 601.

teur, il n'était tenu, dans les circonstances, quant à la mineure, ni de faire inventaire, ni de lui rendre aucun compte. Elle n'avait rien, il ne lui était rien dû.

Par son décès, ses deux frères lui succédaient quant à ses droits futurs, mais, par cet événement, rien n'est changé dans dans la position de Carrier ; il reste après, comme avant dans la jouissance de la part de la défunte, et il ne doit à sa succession ou à ses héritiers, pas plus qu'à elle-même, ni inventaire, ni compte.

Les choses en étaient dans cet état, le 31 août 1830, lorsque Carrier, qui, dix jours auparavant, avait été nommé tuteur à William Andrew et à Catherine Motz, mineurs, tandis que le Demandeur se représentait comme majeur, et se laissait nommer subrogé tuteur par le même acte, aux mêmes mineurs, fait, du consentement, avec l'approbation et en présence du Demandeur, procéder, sans y être tenu, à l'inventaire des biens de la communauté qui avait été entre lui et son épouse, mère des Motz. Cet inventaire, ainsi fait volontairement et à l'amiable entre le Demandeur et Carrier, est, de la part de l'Intimé, argué de nullité pour nombre de raisons : 1° parce que le nommé Harper, qui en septembre 1823, avait été, à la demande de Carrier et de sa femme, nommé tuteur aux trois enfants Motz, tous trois alors mineurs, y compris le Demandeur, était encore leur tuteur à l'époque de l'inventaire : il aurait, partant dû y assister comme légitime contradicteur, ce qui n'avait pas eu lieu ; 2° parce que Carrier n'avait pas la qualité de tuteur qu'il a prise au dit inventaire ; 3° parce que l'élection du Demandeur comme subrogé tuteur était nulle pour la même cause, et parce qu'à cette époque il était encore mineur ; 4° parce que, dans l'inventaire, il avait été fait des erreurs, omissions et recels volontaires et frauduleux, qui en entraînaient la nullité de plein droit.

Pour le moment, sans me prononcer sur la nullité ou la validité de cet inventaire, qu'il me suffise de dire, qu'en le supposant nul, il ne s'ensuivait pas que le Demandeur fût fondé dans ses prétentions, qu'il base sur cette nullité en sa qualité d'héritier de sa sœur.

Si la demande faite par le Demandeur comme héritier de sa sœur, était portée contre l'Appelante comme représentant la succession de Carrier, par Catherine Motz elle-même, et qu'en son propre nom elle réclamât le cinquième qui lui a été légué par sa mère, et qui se trouverait dans la succession Carrier après l'expiration de son usufruit, il est incontestable qu'on ne pourrait pas forcer Catherine Motz d'accepter et de prendre pour base de l'étendue de son cinquième, un inventaire fait pendant sa minorité, sous les circonstances qui viennent d'être mentionnées, et qui serait entaché des vices et défauts que l'on

attribue à celui fait par Carrier. Elle aurait sans doute droit de prendre avantage de ces défauts et d'exiger un autre inventaire légalement et régulièrement fait ; elle aurait droit aussi de demander un compte régulier et légal, accompagné de pièces justificatives de la gestion qu'auraient eue de sa part de biens, les représentants de la succession Carrier, depuis le décès de ce dernier et l'expiration de son usufruit ; mais les droits qu'aurait eus Catherine Motz, dans cette supposition, et sous ces circonstances, les objections qu'elle aurait pu prendre en poursuivant elle-même le Demandeur, lui les a-t-il, et peut-il les prendre, dans la position où il est prouvé qu'il s'est placé ? c'est ce dont je doute.

A sa demande fondée sur sa qualité d'héritier de sa sœur, l'Appelante lui oppose la reddition ou état de compte par Joseph Carrier, dressé par Panet, notaire, le 4 juillet 1839, après le décès de Catherine Motz, de ce qu'il prétendait devoir à sa succession, ou plutôt ce qu'il lui devait, ou plutôt de ce qu'il avait payé pour la succession ; car il ne lui devait encore rien ; mais surtout l'Appelante oppose à cette demande l'acte du 30 avril 1841, dans lequel le Demandeur fait la déclaration suivante : " confirme et approuve le compte rendu, etc. "

Lorsque cet acte fut passé, le Demandeur était depuis longtemps parvenu à sa majorité ; il y avait onze ans que l'inventaire, sur lequel était basé cet état de compte, était fait ; il y avait plus de dix ans que le Demandeur avait, pour lui-même approuvé le principe et les bases sur lesquels le dit acte avait été dressé, en réglant avec Carrier pour sa propre part, par l'acte du 27 avril 1831.

Depuis que cet inventaire avait été fait (août 1830), à venir à l'époque du règlement de compte (avril 1841), le Demandeur qui, d'après ses propres prétentions, était majeur depuis à peu près dix ans, avait eu tout le temps nécessaire pour découvrir et apprécier les vices et défauts qui se pouvaient trouver dans l'inventaire, qu'une fois déjà, il avait approuvé, il y avait plus de dix ans, lorsqu'il avait consenti l'acte de transaction et cession du 27 avril 1831. Si cet inventaire et cet acte qui était basé sur cet inventaire étaient frauduleux et nuls, comme le dit aujourd'hui le Demandeur, rien ne l'empêchait, pendant les dix ans, d'adopter les mesures nécessaires pour faire déclarer la nullité de cet inventaire, et du dit acte de transport ; car la qualité d'usufruitier qu'avait Carrier ne le mettait pas à l'abri d'une action que Motz aurait pu lui intenter pour faire résilier les actes frauduleux, qu'il lui aurait fait consentir à son préjudice.

Depuis longtemps, il n'était plus, en aucune manière, sous la domination ou le contrôle de Carrier, et, partant, il lui était parfaitement libre de le poursuivre pour faire annuler les actes,

si en réalité il les eût regardés comme nuls. Loin de là, au lieu de se pourvoir à cet effet, il confirme et ratifie de nouveau l'inventaire et l'acte de cession, par l'acte du 30 avril 1841.

Cet acte volontairement consenti car le Demandeur, qui lui n'était pas, et n'avait jamais été le pupille de Carrier, avec qui il stipulait, me paraît être non seulement valable et inattaquable pour les raisons invoquées par le Demandeur; mais bien plus, il me semble réparer et rectifier tous les defauts de forme et autres dont pouvaient être entachés l'inventaire et l'acte de cession dont se plaint le Demandeur, et dont il demande l'annulation.

" Les engagements d'un mineur ne peuvent être attaqués " par lui pour vices de forme ou pour lésion, lorsque majeur " il les a ratifiés." (1)

" Celui qui ratifie un contrat ou une convention renonce " implicitement à faire valoir les vices de forme de l'acte; car " ratifier le contrat, c'est en reconnaître l'existence." (2)

" La ratification peut se faire, par un acte formel ou par " l'exécution volontaire." (3)

" Une nullité d'ordre public, quant aux intérêts privés, peut " être couverte par la ratification ou l'exécution, alors qu'elle " ne laisse pas subsister l'atteinte à l'ordre public."

" Une nullité, quoique absolue, peut être couverte par la " confirmation ou ratification, lorsqu'elle n'est établie que pour " l'intérêt des particuliers; ceux-ci peuvent y renoncer s'ils " l'entendent, tel est le cas de la vente d'un immeuble de " mineur, par son tuteur, sans formalités." (4)

" On ne revise aucun compte, sauf, s'il y a erreur, omission, " etc., à réclamer devant le juge qui a connu ou dû connaître " du compte." (5)

Pour établir que le droit qu'aurait pu avoir Catherine Motz elle-même de se plaindre des défauts de l'inventaire et de ce que le compte rendu n'était pas revêtu et accompagné des formalités voulues, n'a pas passé à son héritier, l'on peut référer à l'autorité suivante:

" En tout cas, la nullité prononcée par l'art. 472, contre " tout traité qui n'a pas éte précédé d'un arrêté de compte, ne

(1) Dict. de Législ., *verbo* rescision, N° 33, p. 260.

(2) Le même, *verbo* ratification N° 11, p. 157; 8 Toullier, N° 492.

(3) Dict. Législ., *Ratification*, N° 13.

(4) Le même, N° 25, *Rat.* N° 24 et 25; 7 Toullier, N° 562; 8 Toullier, N° 517.

(5) Dict. de Législ., *Tutelle*, N° 289.

" peut être étendue au traité passé entre le tuteur et *l'héritier* " du mineur. (1)

Ces raisons et ces autorités sont celles qui m'ont amené à la conclusion que le Demandeur s'est lui-même mis hors d'état de faire valoir les nullités qu'il invoque, par l'acte de 1841, indépendamment de la prescription plaidée par l'Appelante, quant à la partie des biens qu'il réclame comme héritier de sa sœur, et que le jugement de la Cour Inférieure est encore vicieux, en autant que, sous ce rapport, il donne gain de cause au Demandeur.

Reste maintenant à examiner s'il est même fondé dans les prétentions qu'il a émises, en sa qualité de cessionnaire de son frère, William Andrew Motz, qu'il représente en vertu du transport du 8 mars 1852.

En cette qualité de cessionnaire, le Demandeur réclame un cinquième au total de la succession de sa mère, légué à William Andrew Motz, son frère, et aussi la moitié du cinquième légué par la même à sa sœur Catherine, dont il est héritier pour moitié. Et à cette fin, il demande l'annulation des deux actes passés entre William A. Motz et Joseph Carrier, l'un étant un transport de droits successifs, en date du 7 décembre 1833, (Panet, notaire), et l'autre une reddition de compte par Jos. Carrier à William A. Motz,et l'acceptation d'icelui compte par ce dernier, le tout, en date du 4 juillet 1839, devant Panet.

Par le premier de ces deux actes (7 déc. 1833), " William A. " Motz cède et transporte, sans garantie que de ses faits et " promesses, à Jos. Carrier, tous et tels droits successifs, mobi- " liers, et immobiliers, tant en fonds et capitaux, qu'en fruits " et revenus, échus et à échoir, rescindants et rescisoires, qui " peuvent appartenir au dit William A. Motz tant dans l'héré- " dité et succession de son père John Motz, que dans l'héré- " dité et succession de Christiana McPhee, sa mère, tels et ainsi " que les dits droits appartiennent au cédant, tant comme hé- " ritier de son père, que comme héritier de sa mère, à quelques " sommes qu'ils puissent se monter."

Par le second des dits actes (4 juillet 1839), Jos. Carrier (Panet, not.) rend à William A. Motz un compte des biens mobiliers et immobiliers de la succession de Cath. Motz, sa sœur d'après lequel il apparaîtrait que l'actif de la succession serait de £505 6 3, à la moitié de laquelle, savoir, à celle de £252 13 1, William A. Motz aurait droit comme l'un des deux héritiers de la défunte ; que sur cette dernière somme, il restait net à balance de £142 11 3 ; et le même jour, William Motz comparait devant Panet, et là et alors déclare qu'il a pris communication du compte, vu et visité les pièces sur lesquelles il est

(1) Dict. de Légis., *Tutelle*, 289.

fondé ; qu'il l'a trouvé juste et correct en tous ses résultats, et en conséquence il veut et consent qu'il soit exécuté suivant sa forme et teneur, dont et du tout acte authentique est dressé au pied du compte.

Tels sont les actes dont le Demandeur demande l'annulation en sa qualité de cessionnaire de son frère. Ce n'est qu'en obtenant cette annulation qu'il lui est possible de réussir dans cette partie de sa demande.

Cette demande est fondée, quant au transport et cession de 1833, sur les raisons de nullité suivantes dont le dit acte serait entaché, savoir : 1° Carrier n'avait jamais rendu compte à William A Motz, et ne pouvait, pour cette cause, légalement transiger avec lui.

2° Le prix de cette transaction était fondé sur des calculs faux et erronés, sans reddition de compte détaillé, sans pièces justificatives produites et remises, et enfin sans inventaire.

3° William A. Motz était mineur lorsqu'il consentait cet acte.

Ces raisons de nullité qui sont les mêmes que celles invoquées contre l'acte de transport par le Demandeur lui-même, du 27 avril 1831, et dont il a été disposé plus haut, ont cependant sur le cas actuel une importance qu'elles n'avaient pas sur le premier acte.

Quant à l'obligation où l'on prétend, qu'était Carrier de faire inventaire, et de rendre compte à William A. Motz, à peine de nullité de tous actes de transaction qui seraient faits entre eux, il est certain qu'il y a une différence essentielle entre la position de James Motz, lorsqu'il transigeait avec Carrier, et celle de son frère William A. Motz, lorsqu'il consentait l'acte dont nous nous occupons. Le Demandeur, lui, n'avait jamais eu Carrier pour tuteur, tandis que dans le cas de William A. Motz, Carrier avait été son tuteur et son pro-tuteur, gardien ou administrateur ; si l'élection de Carrier comme tuteur aux mineurs Motz, du mois d'août 1830, était nulle, à raison de l'élection précédente et existante encore de Harper, comme le prétend le Demandeur, dans l'un comme dans l'autre cas, Carrier aurait été tenu de rendre à William A. Motz un compte en forme, appuyé de pièces justificatives, et fondé sur un inventaire préalablement fait suivant la loi, si toutefois, en cette qualité de tuteur, ou, dans l'une des autres qualités susmentionnées, il eût eu, de fait, et en réalité, la gestion et administration de quelques biens, soit mobiliers ou immobiliers, appartenants au mineur.

Mais, quoique Carrier ait été tuteur de William A. Motz, et que, comme tel, ou comme pro-tuteur ou autrement, il eût eu la garde de sa personne, la preuve dans la cause constate qu'à l'époque où a été passé cet acte, argué de nullité, William

A. Motz n'avait jamais eu, et n'avait encore alors aucuns biens que Carrier eût pu administrer : ce fait important d'absence de biens, à la date du dit acte, est établi au delà de tout doute. Tous les biens qui devaient lui appartenir étaient ceux qui lui avaient été légués par sa mère, avec réserve d'usufruit en faveur de Carrier, qui, tant qu'il vivrait, aurait droit de jouir du tout, pour son propre compte et avantage, sans être tenu ni d'en faire inventaire, ni d'en rendre compte à qui que ce soit ; tant qu'il a vécu, d'après le testament, c'est pour lui-même qu'il a géré les biens de la testatrice ; c'est sa succession, qui, après la mort du dit Carrier, était tenue de remettre à chacun des légataires la propriété, et entre autres à William A. Motz, la part qui lui avait été léguée après l'expiration de l'usufruit.

Le point important à enregistrer ici, c'est que lorsque William A. Motz consentait l'acte en question, Carrier n'avait pas géré ses biens, et ne lui devait pas de compte.

Cependant, Carrier, quoiqu'il n'y fût pas tenu, juge à propos et consent de faire procéder à un inventaire ou état des biens qui avaient composé sa communauté avec la mère des Motz, et à cette fin il se fait élire tuteur à deux des enfants, qui sont mineurs, et il fait nommer le Demandeur, *qui se dit majeur*, leur subrogé tuteur, et, en sa présence, et de son consentement, il fait procéder au dit inventaire ou état, et sur cet inventaire est calqué un bref état de compte, d'après lequel, la part que chacune des parties intéressées aura, lors de l'expiration de l'usufruit, est indiquée ; et sur cet inventaire et cet état de compte sont basés tous les calculs qui ont servi à faire la transaction dont nous nous occupons dans ce moment.

Je suis enclin à croire que cet inventaire aurait pu être répudié par ceux des héritiers Motz qui étaient mineurs lorsqu'il fut fait, après le décès de Carrier ; qu'ils auraient pu refuser de l'accepter comme la base de leurs droits. Car, si Carrier, quoi qu'exempté de faire inventaire, jugeait à propos, dans son intérêt ou pour sa satisfaction, de faire procéder à un inventaire qu'il aurait été tenu de faire, s'il n'en eût été exempté par le testament, il était de son devoir de le faire faire légalement, et avec toutes les formalités voulues par la loi. Ce n'est qu'en le faisant faire de cette manière qu'il aurait pu exempter sa succession d'y faire procéder après son décès. Or, une de ces formalités essentielles était qu'il y eût un légitime contradicteur. Ce légitime contradicteur devait être le tuteur lui-même qui fît l'inventaire ; or, à l'époque où fut fait celui dont il est maintenant question, apparemment il y avait deux tuteurs aux mêmes mineurs, Harper et Carrier. Harper paraît avoir été nommé régulièrement ; son acte de nomination lui donne la gestion de la personne et des biens des mineurs ; c'est l'élection

d'un tuteur dans la forme ordinaire et pour toutes les fins légales. Il est cependant bien probable que ce n'était que pour mettre Carrier et son épouse en position de porter contre lui l'action dont ils avaient besoin pour obtenir contre la succession de John Motz, la délivrance du legs universel qu'il avait fait à Christiana McPhee, son épouse. Cette supposition est rendue très vraisemblable par l'action dirigée à cette fin contre Harper comme tuteur, et par le jugement en délivrance qui en est résulté.

Mais, quoique l'on soit à peu près sûr que cette nomination n'avait été faite que dans cette vue, cependant comme elle était générale, et accordait au tuteur élu la garde des personnes et des biens des mineurs, sans restriction, Harper, ainsi nommé avec toutes les formalités nécessaires, et cette nomination dûment homologuée en justice, a véritablement été fait tuteur à toutes fins quelconques, et cette charge il devait la garder jusqu'à ce qu'il eût pris légalement décharge, soit en justice ou par la majorité des dits mineurs. Il est certain que la mère, et même Carrier, le beau-père des mineurs, auraient bien pu reclamer contre cette nomination, la faire mettre de côté, et se faire nommer à la place ; rien de semblable ne paraît dans la cause. Il n'y a pas de destitution, et Harper vivait encore, et partant, il était encore tuteur, lorsque Carrier s'est fait nommer comme tel, sans destitution préalable ; d'où il suit que cette nouvelle nomination de Carrier, faite sous de pareilles circonstances, était illégale. Carrier n'était donc pas tuteur lors de l'inventaire, c'est Harper qui l'était et qui devait y agir comme légitime contradicteur. Son absence, sans explication, est seule capable d'entacher l'inventaire de nullité radicale, en autant que l'intérêt des mineurs y était concerné. Cet inventaire, par exemple, n'aurait pas eu l'effet d'empêcher la continuation de communauté, si cette communauté n'eût été dissoute en vertu du testament. Ainsi, je suis d'avis que le Demandeur a raison de dire que cet inventaire est nul quant aux mineurs, et qu'il ne pouvait leur être opposé, et qu'ils ne seraient pas tenus d'en passer par son contenu, si, après être parvenus à leur majorité, ils n'ont rien fait qui puisse le valider, le rendre suffisant ou en faire disparaître la nécessité. D'où il suit que le compte qui aurait été rendu sur et d'après cet inventaire, si compte avait été dû, aurait été nul, par suite de la nullité du dit inventaire.

Mais, comme il a été dit déjà plusieurs fois, de son vivant, Carrier ne devait ni inventaire, ni compte, ce qu'il en a fait, n'était que pour poser les bases d'après lesquelles les parties pouvaient, si elles le désiraient, transiger à l'amiable.

Cet inventaire et cet état de compte peuvent être vicieux et nuls quant à la forme, et être pourtant suffisants pour servir

de bases aux actes de transactions dans lesquels il y est fait allusion.

Ainsi, si l'acte du 7 décembre 1833, est nul, ce n'est pas parce que l'inventaire est nul, ni parce que Carrier n'avait pas rendu compte.

Mais, dit le Demandeur, cet acte est encore nul, parce que les calculs sur lesquels a été fixé le prix payé par Carrier, sont faux, erronés et frauduleux ; l'état sur lequel se sont guidées les parties, en faisant cette transaction, contenait des omissions et recels considérables, et faits volontairement et frauduleusement de la part de Carrier.

En point de fait, le Demandeur est fondé à dire que c'est sur l'inventaire du 31 août 1830, et sur le compte y annexé qu'a été fixée la somme payée par Carrier à William Motz, comme étant la part à laquelle il avait droit dans la succession de sa mère, d'après le testament de cette dernière, puisqu'il y est dit en propres termes :

" La somme de £505. 6. 3. est le montant exact des dits " droits mobiliers et immobiliers, suivant le compte dressé par " Panet, notaire, le 14 avril 1831, annexé à l'inventaire dressé " par le dit Panet, le 31 août 1830."

Le Demandeur, d'après la preuve, paraît également fondé à prétendre que dans l'inventaire ou état en question, se remarquaient des omissions importantes, consistant surtout dans les reprises que la succession de la défunte avait droit de faire sur les biens de la communauté pour les immeubles qui, pendant sa durée, avaient été aliénés, étant propres à la défunte, et dont il n'est fait aucune mention dans l'inventaire ; il paraît également que quelques-uns des articles, par exemple : la montre d'or, ont été estimés à une valeur moindre que celle qu'ils avaient réellement. Mais ces vices, graves comme ils sont, ne font pas que l'acte soit nul, ni même que l'on puisse en demander la nullité, à moins que l'on eût prouvé non seulement que c'est par fraude que ces erreurs ont été commises, et que ces omissions ont éte faites, mais encore et de plus, que c'est par suite de cette fraude que le dit William A. Motz a été induit à consentir l'acte en question ; or cette preuve, je ne la trouve pas faite dans la cause.

Si donc le dit acte est nul, ce ne peut être pour les raisons qui viennent d'être énumérée ; mais peut-être l'est-il parce que, lorsqu'il était passé, William A. Motz était encore mineur, comme le prétend le Demandeur ; ou bien encore, parce que, quoiqu'alors parvenu à sa majorité, toutes transactions faites entre lui et Carrier, étaient nulles et prohibées par la loi d'après les rapports existants alors entre eux.

Quant à la question de minorité, il faut admettre avec le Demandeur, que la déclaration fausse ou erronée faite par le

mineur dans un acte qu'il consent, et dans lequel il se dit majeur, sans l'être, ne le prive pas du droit de se faire restituer ou relever; mais, dans ce cas, il est de son devoir de justifier de sa minorité ; chaque fois que le mineur a pris la qualité de majeur, ou que même il a agi comme tel, c'est à lui à prouver l'erreur, et non à celui avec qui il a contracté.

" Celui qui intente une action en rescision, doit faire la " preuve des faits sur lesquels il l'appuie. " (1)

" Si l'action repose sur une allégation d'incapacité, la preuve " se fait par la production de l'acte de l'état civil. " (2)

" C'est au mineur à prouver sa minorité lorsqu'elle est contestée. " (3)

" C'est toujours à lui (au mineur) de prouver sa minorité si " elle est contestée. " (4)

Dans notre espèce, William A. Motz, agit comme majeur dans l'acte en question ; d'après sa propre prétention, il n'aurait manqué, lors de l'acte, que huit jours, pour qu'il eût été majeur. Ce peu de temps aurait suffi pour l'autoriser à dire qu'il était mineur et lui donner les recours attribués par la loi à cette qualité ; mais il fallait prouver ce fait de minorité d'une manière satisfaisante, et comme tout autre fait doit l'être par celui qui y est tenu. Le Demandeur ne paraît pas avoir fait cette preuve. C'est à peine s'il établit la destruction des registres de la localité où les mineurs sont nés. Cependant, cette destruction devait être prouvée pour que la preuve testimoniale fût reçue au lieu de la production de l'acte de baptême ou de naissance.

Quant à la preuve testimoniale faite, elle est imparfaite, incertaine et contradictoire. Cette preuve est insuffisante, et j'en conclus que l'acte n'est pas nul parce qu'il a été consenti en minorité.

L'est-il pour la raison que les rapports existant entre Carrier et William A. Motz, étaient tels qu'ils ne pouvaient stipuler entre eux légalement.

Lorsque l'acte dont nous nous occupons a été passé, Carrier avait été le tuteur de William A. Motz, ou bien Harper était son véritable tuteur, vu que la nomination subséquente de Carrier comme telle était nulle, toujours est-il que Carrier, qui avait élevé les enfants Motz, avait été leur gardien, il avait eu, du moins, la garde de leur personne, il aurait probablement eu aussi la gestion de leurs biens, s'ils en avaient eus ; mais il a

(1) 7 Dict. de Légis., *vbo* rescision, nº 42, p. 260.

(2) 7 Dict. de Légis., *vbo* rescision, no 43.

(3) Idem, nº 27 ; 7 Toullier, no 582.

(4) nº 582.

été dit déjà qu'à l'époque dont il s'agit ils n'en avaient aucuns.

Il faut bien remarquer que, dans l'acte de transport et cession, ce ne sont pas les biens qui ont appartenu au mineur et dont Carrier a eu gestion, qui sont cédés ; mais ce sont uniquement ceux qui doivent écheoir à William A. Motz, après le décès de Carrier. Ces droits ainsi cédés lui sont assurés par le décès de sa mère, suivant son testament, mais ce n'est que le décès de Carrier qui doit le mettre en jouissance. Ainsi, ni comme tuteur, ni comme pro-tuteur, ni comme gardien, Carrier n'avait aucun compte à rendre d'aucune gestion de biens appartenant au mineur.

D'après ce qui précède, la question de la nullité ou de la validité de l'acte fait sous ces circonstances dépend de celle de savoir si la loi, qui déclare nulles toutes transactions faites entre le tuteur et le mineur devenu majeur, est limitée seulement au cas où ce tuteur, ayant géré et administré les biens de son pupille, a transigé avec lui au sujet de la gestion et administration de ces biens, sans au préalable lui avoir rendu un compte légal et soutenu de pièces justificatives, ou si cette prohibition s'étend même au cas où le tuteur, n'ayant pas géré, et n'ayant pas eu de biens à gérer, et partant ne lui devant aucun compte, aurait fait avec son pupille devenu majeur une transaction dont l'objet serait relatif à des biens non encore échus au mineur devenu majeur, et dont le tuteur n'avait jamais eu la gestion.

Pour le tuteur qui a géré les biens de son mineur, le compte est indispensable. La loi a réglé la forme et la formalité de ce compte ; elles doivent être suivies à peine de nullité. Un compte rendu sans les formalités ainsi voulues est considéré comme non avenu, et toutes quittances et décharges données, et toutes transactions faites sans compte préalablement rendu suivant la loi, sont nulles. Sous ce rapport, pas de difficulté ; l'ancienne jurisprudence et le nouveau droit sont d'accord sur ce point.

Mais si le tuteur qui n'a pas eu de biens à gérer pour son pupille, pour la raison qu'il n'en avait pas, achète ou acquiert à tout autre titre de ce mineur, devenu majeur, des droits qui ne lui sont pas encore échus, ou des biens dont il n'a pas encore la jouissance, ou fait avec ce mineur tout autre contrat ou convention relatifs à des biens ou affaires qui n'ont jamais été sous le contrôle du tuteur, ces contrats, conventions ou stipulations seront-ils nuls, par suite des rapports antérieurs qui ont existé entre les parties, et seulement parce que tels actes n'ont pas été précédés d'une reddition de compte ?

La négative de cette proposition me paraît devoir être admise sans difficulté ; il serait si absurde de dire que, parce qu'une personne a été tuteur d'une autre, il sera pour toujours

privé du droit de faire avec lui des affaires qui n'ont aucune relation avec la tutelle, et cela seulement parce que ce tuteur n'a pas rendu un compte qu'il lui était impossible de rendre. (1)

Les autorités suivantes établissent cette opinion au delà de tout doute :

" Toutefois s'il est constant que le mineur n'a pas eu de " biens et qu'il a été dressé procès-verbal de la carence de biens " au décès de ses auteurs, le mineur ne peut attaquer une " transaction faite avec son tuteur, sous prétexte qu'il n'a pas " été précédé d'un compte de tutelle." (2)

" Il suffit encore qu'un mineur n'ait d'autre fortune qu'une " constitution en argent payable à sa majorité, et n'ait aucun " bien à administrer, pour qu'il n'y ait lieu à aucune reddition " de compte tutélaire de la part du tuteur, et que, par suite. " l'on ne puisse faire annuler, pour n'avoir pas été précédé d'un " compte, le traité passé entre le tuteur et son pupille." (3)

" En tout cas, la nullité prononcée par l'article 472 contre " tout traité qui n'a pas été précédé d'un arrêté de compte, ne " peut être étendu au traité passé entre le tuteur et l'héritier " du mineur. " (4)

" Au surplus, les dispositions de l'art. 472 s'étendent seule- " ment aux traités et transactions qui portent sur le compte " même de tutelle, et non aux autres contrats étrangers que le " tuteur peut faire avec son pupille devenu majeur." (5).

Par suite, une transaction passée entre un tuteur et son " pupille devenu majeur sans reddition de compte préalable de " tutelle a pu être déclarée valable, si d'ailleurs, il est constaté " 1° que dans la position ou le tuteur était placé, il n'avait " aucun compte à rendre ; 2° que le pupille a éxécuté les " transactions pendant près de vingt ans." (6)

Carrier se trouvait dans la position de ce tuteur, et les mineurs Motz se trouvaient dans la position du mineur indiqué dans ces citations. Les mineurs n'avaient aucuns biens que leur tuteur pût gérer. Carrier leur tuteur, n'ayant pas géré leurs biens, n'avait aucun compte à leur rendre ; l'acte qu'il a fait avec son pupille n'avait aucun rapport avec le compte de

(1) V. art. 311 C. C.

(2) 7 Dict. de Législ., *vbo* tutelle, n° 314, p. 235.

(3) Le même, n° 316.

(4) No 318.

(5) Le même, No 319 ; Brillon, *verbo* tuteur, n° 29 ; Ancien Dénizart, *verbo* tutelle, n° 78 ; II Bousquet, Domat, livre II, titre I, s. 5, no 4, *verbo* transaction, 774 ; I Delvincourt, p. 131 ; 3 Duranton, n° 638.

(6) Dalloz, *verbo* tutelle, No 578. Voir le même, 378, 380, 382, 383, 384.

tutelle ; il y était donc tout à fait étranger. L'acte fait avec lui aurait été parfaitement valable, s'il eût été fait avec tout autre : il doit être valable avec lui de même. Ce n'est donc pas encore faute de compte préalable que l'acte a dû être regardé et traité comme nul. Je le regarde donc comme valable, et sous ce rapport, la Cour Inférieure a mal jugé en prononçant sa nullité.

Mais, si en dépit de toutes ces raisons, l'acte en question devait être regardé comme entaché de nullité ; sûrement cette nullité ne serait pas absolue, et telle qu'elle ne pût être rectifiée, et l'acte validé par ratification et exécution subséquente.

Or, si cet acte était susceptible d'être ratifié, sûrement il l'a été par l'acte du 4 juillet 1839, si toutefois ce dernier n'est lui-même entaché de nullité radicale, comme le prétend encore le Demandeur.

Ce dernier acte, dit-on, approuve et ratifie le compte ou état fourni par Carrier à William A. Motz, au sujet de la succession de Catherine Motz, sa sœur, et montre la balance nette qui revenait à William A. Motz sur la part qu'il avait en cette succession : et comme ce compte, dit le Demandeur, est radicalement nul, pour les raisons déjà exprimées, l'acte qui le ratifie et approuve doit de nécessité être entaché de nullité.

Il est inutile de répéter ici ce qui a déjà été dit au sujet de ce compte du 4 juillet 1839. Ce compte, s'il eût été rendu à la mineure devenue majeure, et que, de plus, Carrier eût eu la gestion des biens de cette dernière, aurait certainement été insuffisant et nul ; mais il n'était pas dû, rien n'obligeait Carrier à le rendre ; il était du reste rendu, non à la mineure elle-même, mais à son héritier qui était libre de l'accepter ou de le répudier. Il était en son pouvoir, s'il le trouvait avantageux, d'attendre l'expiration de l'usufruit de Carrier, et alors se faire remettre par sa succession ce qui lui serait revenu dans la succession de sa sœur. Au lieu de cela, William A. Motz, six ans au moins après avoir transigé avec Carrier pour sa propre part, consent ce nouvel acte, qui est basé sur les mêmes calculs et les mêmes données que celles adoptées dans l'acte de 1833, lequel, comme celui de 1839, admettait comme la part de chacun des héritiers ou légataires Motz dans la succession de leur mère, la somme de £505 6 3. Cet acte donc, dont probablement la mineure elle-même aurait eu droit de se plaindre, contre lequel elle aurait peut-être pu se faire restituer, si c'eût été elle qui l'eût consenti, après sa majorité, ne peut être attaqué pour les mêmes causes par son héritier, suivant l'autorité déjà citée." (1) " En tout cas, la nullité pro-
" noncée par l'art. 472, contre tout traité qui n'a pas été pré-

(1) 7 Dict de Législ., *verbo* tutelle, No 318, p. 235.

" cédé d'un arrêté de compte, *ne peut être étendu au traité* " *passé entre le tuteur et l'héritier du mineur.*"

Ces raisons doivent convaincre que cet acte de 1839 est valable, qu'il lie le Demandeur, comme il liait son cédant qui l'avait consenti, et que c'est à tort que la Cour Inférieure l'a traité comme nul.

Ce qui précède suffirait, je pense, pour dispenser de l'examen de la question soulevée par l'Appelante, consistant à savoir :

" Si, en admettant que les actes consentis par William A. " Motz fussent annulables, le Demandeur, comme cessionnaire " de son frère, avait droit de demander cette nullité, vu que " l'acte de transport par lequel il représente son frère (acte " du 8 mars 1852) ne lui a pas cédé, en propres termes, les " rescindants et rescisoires qui pouvaient lui appartenir."

Cette question est sans portée aucune, d'après la solution donnée à celles qui l'ont précédée, puisqu'il a été démontré que William A. Motz, qui a consenti ces actes, n'aurait pas pu faire reconnaître leur nullité, s'il l'eût demandé lui-même, à plus forte raison, son cessionnaire ne le pouvait-il pas, quand même il aurait tous les droits qui appartenaient à son cédant, les rescindants et les rescisoires avec le reste.

Pourtant, puisque la question a été soulevée, il est aussi bien de dire que, d'après les autorités citées de la part de l'Appelante, et quelques autres qu'on peut y ajouter, il paraît bien établi que le droit qu'a le mineur parvenu à sa majorité de demander lui-même la rescision d'un acte passé en minorité, n'est pas transporté au cessionnaire par la cession qui lui est faite des droits de ce mineur, sans une stipulation expresse que le droit de demander cette rescision est cédé avec le reste.

" Cession générale de droits et actions ne comprend les " rescindants et rescisoires." (1)

" Cession, même générale, des droits et actions ne comprend " pas les actions rescisoires, parce qu'elles dépendent absolu- " ment de la volonté, et que, quelquefois, il y va de l'honneur " et de la réputation, et que *actionis verbo* non *continetur* " exceptio." (2)

Il a été dit déjà et répété que, de tous les actes dont se plaint le Demandeur, il n'en est aucun qui soit nul de plein droit, tellement que la ratification ne le pût valider. Ce que l'on peut dire de plus favorable au Demandeur, c'est que ces actes étaient annulables, soit parce qu'ils avaient été faits en minorité, ou bien rectifiables parce qu'il y avait eu erreur,

(1) Lacombe, *verbo* restitution, p. 597, N° 15.

(2) Le même, *verbo* transport, p. 764 ; II. Arrêt de Louet, Lettre T. P ; 3 Delvincourt, Note (6).

omission, recels ou même surprise, déception ou fraude. Or si ces actes n'étaient qu'annulables, l'action pour faire déclarer cette nullité, aurait dû être portée dans les dix ans après leur confection, s'ils ont été passés en majorité, et dans les dix ans depuis la majorité, s'ils ont été passés en minorité.

Je n'ai rien dit au sujet du don gratuit dont il a été fait un point dans l'argumentation, la chose étant inutile, puisque la Cour Inférieure avait sous ce rapport débouté le Demandeur et donné gain de cause à l'Appelante, et que, quoique le Demandeur se soit plaint de cette décision, n'ayant pas fait un contre-appel, il serait impossible à la cour pour cette raison de réparer l'injustice dont il se plaint, quand même elle serait d'avis qu'elle existe.

Sur chacune des propositions que j'ai discutées, il m'a fallu en venir à une conclusion différente de celle adoptée par la Cour Inférieure : il n'en pouvait être autrement, puisque je diffère avec elle, tant en fait qu'en droit, sur chacune des propositions qu'elle a émises dans son jugement, comme étant les motifs sur lesquels il est basé. Ces motifs ne m'ont paru ni justifiés par la preuve, ni conformes à la loi : pour ces raisons, je regarde le jugement dont est appel incorrect en son entier, et suis d'avis qu'il doit être infirmé *in toto.*

MONDELET, juge : Je ne partage aucune des opinions qui viennent d'être énoncées par l'honorable Président de la Cour, et par l'honorable juge Caron, et j'aurais été disposé à confirmer le jugement, si je n'avais eu devant moi l'ordonnance de 1539, et si je n'y trouvais pas une disposition qui ne me laisse aucune discrétion. Il ne faut pas moins que cette loi pour imposer silence à toutes les considérations qui auraient pu justifier une conclusion contraire. Je trouve dans cette ordonnance une défense d'écouter une action semblable à celle qui nous est soumise, lorsqu'elle est portée après dix ans ; les termes sont impératifs, et en conséquence, pour cette raison seule, je concours dans le jugement qui va être rendu, et qui infirme celui de la Cour de première instance. Mais je ne puis concourir dans les autres motifs insérés dans ce jugement. Comme il a été observé, la question de minorité a beaucoup influé sur la Cour Inférieure ; je partage son opinion sur ce point, et je me trouve fortifié dans ma détermination sur la minorité de Motz, par l'observation de l'honorable juge Caron qui admet lui-même qu'il y a des doutes à cet égard. On a dit que James Motz ayant fait une déclaration qu'il était majeur, c'était à lui à démontrer, d'une manière évidente, qu'il était alors mineur. Ce principe est concédé dans toute sa latitude. La question est de savoir, s'il a fait cette preuve. On allègue la déclaration faite par Motz en l'acte de tutelle. Un auteur a dit qu'il était aussi facile de faire dire à un mineur qu'il est

majeur, que de l'engager ou induire à vendre ses propres biens. Cette déclaration ne peut guère avoir de poids. Les présomptions que l'hon Juge en Chef tire de l'intérêt de Carrier d'avoir l'apparence d'un légitime contradicteur me paraissent peu fondées. Carrier a pu calculer d'avance sur le besoin que Motz aurait d'argent et sur l'obtention d'une décharge, qu'il a en effet obtenue en 1841. La décharge de l'obligation de faire inventaire ne peut valoir. L'inventaire qui a été fait est illégal, n'ayant pas été fait avec un légitime contradicteur. J'ai des doutes, quant à la question s'il était nécessaire d'une action pour faire déclarer la nullité de plusieurs de ces actes, et il n'a fallu rien moins que l'acte de 1841 pour passer l'éponge sur le tout. La mère est censée le plus en état de connaître l'âge de ses enfants, mais ici nous n'avons pas sa déclaration formelle ni juridique à cet égard ; et la requête pour tutelle a pu n'être que l'acte d'un notaire, comme c'est ordinairement le cas, nous n'avons encore que des présomptions. Mais il est un fait décisif : Catherine Murphy dit que son enfant est né dans tel mois ; elle a connaissance de la naissance de James Motz, il avait trois mois quand elle a eu son enfant, c'est là, à mon avis, une preuve concluante ; cette femme devait bien connaître l'âge de son enfant, et elle affirme positivement que James Motz avait trois mois de plus. Je suis donc convaincu que James Motz est né en 1810, conséquemment qu'il était mineur lors de la tutelle, mais non lors de l'acte de 1841. J'ai eu de la difficulté à m'expliquer l'opinion des auteurs qui ont soutenu que l'action ne se prescrivait que par trente ans dans les cas de dol, fraude, etc. On sent l'importance de recourir, en pareil cas, à la source, à une ordonnance précise, et sans l'ordonnace de François I, art. 134, je n'aurais pu aucunement concourir dans le jugement de cette cour.

Le jugement de la Cour d'Appel est comme suit :

La cour, 1° considérant qu'il n'existe pas d'acte authentique constatant l'époque de la naissance de l'Intimé James Motz, et de son frère William A. Motz, tous deux nés du mariage des défunts John Motz et C. McPhee.

2° Considérant, quant à l'Intimé, que selon les déclarations qu'il a faites lui-même, principalement à l'occasion de sa nomination à la charge de subrogé tuteur de son frère et de sa sœur, le 21e jour d'août 1830, il doit être réputé avoir atteint, dès avant ce jour-là, son âge de majorité ; que, dans ces circonstances, il incombait à l'Intimé, qui a prétendu en cette instance qu'il était encore mineur à cette époque, d'établir le fait de cette minorité par une preuve claire et précise, mais qu'une telle preuve n'existe pas au dossier.

3° Considérant, quant à William A. Motz, qu'il résulte de la preuve qu'il a atteint sa majorité dès avant le 7 décembre 1833,

date du transport qu'il a fait à Joseph Carrier ; qu'en supposant même que cette preuve n'existerait pas, le dit William A. Motz n'en devait pas moins être réputé avoir été majeur à l'époque de l'acte du dit transport par le fait seul de cet acte même, à moins d'une preuve claire et précise au contraire ; qu'il incombait à l'Intimé de faire une telle preuve ; mais qu'il n'a pas réussi à la faire.

4° Considérant que le dit Joseph Carrier avait sa vie durant la jouissance et l'usufruit des biens légués en propriété par Christiana McPhee à ses enfants ; qu'en vertu de l'acte qui lui a conféré la tutelle de William A. et Catherine Motz, sœur de ce dernier et de l'Intimé, Joseph Carrier n'a pas eu à administrer d'autres biens appartenant à ces deux mineurs, puisque pendant cette tutelle ces deux enfants n'ont pas eu d'autres biens que ceux ci-dessus mentionnées ; considérant que Joseph Carrier n'a jamais été le tuteur de l'Intimé, que dans ces circonstances il n'a pas eu de compte à rendre aux trois enfants Motz, que, par conséquent, l'absence de reddition de compte n'est pas un moyen que l'Intimé puisse valablement invoquer pour faire annuler les traités que lui et son frère ont faits avec Joseph Carrier.

5° Considérant que l'Intimé et son frère étant réputés avoir été majeurs lorsque les dits traités ont eu lieu, ces traités ont pu être valablement faits entre eux et Joseph Carrier, non seulement pour leurs propres parts, mais encore pour celle de leur sœur décédée en minorité et dont ils étaient héritiers.

6° Considérant qu'en supposant que l'action en nullité eût pu être valablement intentée, cette action a été néanmoins périmée par le laps des dix années durant lesquelles la loi permettait de l'intenter.

7° Considérant qu'il n'a pas été prouvé que l'inventaire du 31 août 1830, fut entaché de dol et de fraude, que les erreurs et omissions qui y ont été signalées ne sont pas dans les circonstances de la cause de nature à faire annuler l'inventaire, qu'elles peuvent seulement donner lieu à une demande spéciale en réformation ou rectification, dans laquelle action l'*onus probandi* tomberait en premier lieu sur l'Intimé, que, par conséquent, celui-ci n'était pas fondé à se pourvoir, comme il l'a fait, par une action générale en nullité, en pétition d'hérédité, en confection d'inventaire et en reddition de compte.

8° Considérant, par conséquent. que, dans le jugement dont est appel, il y a eu mal jugé, en ce qu'il porte condamnation contre l'Appelante, ès noms et qualités, qu'elle agit : Infirme le susdit jugement, savoir, le jugement, rendu par la Cour Supérieure, siégeant à Québec, le 5 septembre 1855, et ce, en autant qu'il porte la susdite condamnation, et déclare nul le susdit inventaire et les autres traités ou actes qui y sont

énumérés ; et cette cour procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, déboute le dit James Motz de son action contre la dite Appellante, ès noms et qualités, réservant néanmoins au dit James Motz tel recours légal qu'il eût pu exercer par action spéciale, de même que si la présente action n'eût pas été intentée.

Le juge Mondelet concourt dans le résultat du jugement sur le débouté de l'action de James Motz sur le principe de la prescription des dix ans, aux termes de l'article 134e de l'ordonnance de François Ier de 1539 ; mais il n'accède aucunement aux autres considérants du jugement rendu ce jour par cette cour. (7 *D. T. B. C.*, p. 147.)

GAUTHIER, pour l'Appelante.

STUART. G. O., Conseil.

LELIÈVRE et ANGERS, pour l'Intimé.

PRESCRIPTION.—RELEASE.—MINOR.—APPEAL.

HER MAJESTY IN HER PRIVY COUNCIL,
5th, 6th, & 7th July, 1855.

On Appeal from the Court of Appeals of the Province of Lower Canada.

Present: The Right Hon. The Lord Justice KNIGHT BRUCE, the Right Hon. SIR EDWARD RYAN, the Right Hon. The Lord Justice TURNER, and the Right Hon. SIR JOHN TAYLOR COLERIDGE.

JAMES MOTZ, Appellant, and Dame HENRIETTE MOREAU, Respondent.

Claims though not barred by prescription may be extinguished by a release, or the remedy destroyed by conduct operating as a release.

Assignments by a minor to his tutor (though voidable), impeached after a lapse of years, sustained, the evidence establishing that subsequent dealings had taken place between the minor and tutor, after the former was of age, which amounted to a release of all claims on the part of the minor. The fact that such assignments and dealings had not been impugned by the minor, when of age, until after the death of the tutor, speaks strongly against the claim of the minor for an account and inventory, and to set aside the assignments. Petition for a rehearing of an appeal, on the ground that the judgment of the Judicial Committee had been formed upon certain documents which were improperly included by the clerk of the Appeals in *Lower Canada* in the transcript of documents, having been excluded from the pleading by an *Acte* of the court below, refused, as it appeared that the Petitioner had not objected to the documents forming part of the transcript, and had sought to take advantage of such documents as evidence at the hearing of the appeal.

Practice of the courts in *Lower Canada*, in excluding evidence taken upon interrogatories by an *Acte* made upon motion by the party administering them.

This action was instituted by the Appellant against the Respondent in the Superior Court at Quebec. The object sought by the Appellant in the action was to recover his share in the estate and succession of his mother the late Christiana McPhee, as well in his own right, as also as representative of his brother, William Andrew Motz, whose rights had been transferred over unto him, and of his deceased sister, Catherine Motz, of whom he was one of the heirs at law. The action was brought against the Respondent, the widow of the late Joseph Carrier, as well in her own name, as in her quality of tutrix to her minor children (she being in possession of the property and estate sued for) for the purpose of making her render an account, and to compel her to make an inventory, and likewise to obtain a division and a judicial sale of the property (d'opérer un partage et licitation). The Appellant's action, moreover, demanded the annulling and rescision of several deeds, and impeaching an account and inventory together with transactions and discharges which had passed between himself as one of the heirs, Motz, and the late Joseph Carrier, relating to the property in question.

The Superior Court at Quebec gave a unanimous judgment for the Appellant. Upon appeal the Court of Appeals at Montreal reversed that judgment. Hence the present appeal.

The facts of the case and the principle grounds raised upon the pleading and urged in the argument upon the appeal are fully detailed in the judgment of Their Lordships, which as it turned on a question of general and not local law, render it inexpedient to set out the authorities cited.

The appeal was argued by Mr. R. PALMER, Q. C. and Mr. E. KARSLAKE, for the Appellant; and sir HUGH CAIRNS, Q. C., and Mr. WICKENS, for the Respondent.

Their Lordships' judgment was delivered by the Lord Justice Turner.

This is an appeal from a judgment of the Court of Queen's Bench of Lower Canada sitting in appeal, by which that court reversed a judgment of the Superior Court of Lower Canada for the district of Quebec.

The Appellant James Motz, the Plaintiff in the suit in the Superior Court, is the eldest son of the marriage of John Motz and Christiana McPhee. There were two other children of that marriage, William Andrew Motz and Catherine Motz. John Motz, the father, died on the 1st of October, 1819, having, by his will, given all his property, real and personal, movable and immovable, to his wife, Christiana McPhee. In the month

of December, 1819, Christiana McPhee, his widow, intermarried with Joseph Carrier. Upon this marriage a community of the movable, but not of the immovable, property of the husband and wife took effect, according to the law of Lower Canada. There was issue of this marriage, one child only, Joseph Carrier, the younger.

On the 23rd of September, 1823, the Court of Queen's Bench of Lower Canada, upon the application of Joseph Carrier and Christiana McPhee, appointed Lewis Harper to be the tutor and John Kerry to be the sub-tutor of the Appellant, and of the two other children of John Motz, all of whom were them minors; and the same court, on the 8th of October, 1824, in a suit instituted by Carrier and his wife against Lewis Harper, ordered the will of John Motz to be carried into effect, and made deliverance to Christiana McPhee of all the property given and bequeathed to her by the will.

On the 24th of December, 1828 Christiana McPhee made her will, by which she directed all her debts and funeral expenses to be paid out of her estate by her testamentary executor, therein after named, and gave and bequeathed to her husband, Joseph Carrier, the use and enjoyment, during his life, of the whole of the property, real and personal, movable and immovable, without exception or reserve, which she might be possessed of, of what soever value the same might be, and wheresoever situate, thereby expressly dispensing Joseph Carrier from making any inventory of the property, trusting entirely to his discretion in that respect; and as to the property of her estate, to be enjoyed as aforesaid by Joseph Carrier during his life, she willed, devised, and bequeathed, the same unto her husband, Joseph Carrier, and Joseph Carrier her son, and to the Appellant, William Motz, and Catherine Motz, her children, issue of her first marriage with John Motz, thereby instituting them, Joseph Carrier, Joseph Carrier the younger, James Motz, the Appellant, William Motz, and Catherine Motz, her children, her universal and residuary legatees, in full and entire property, ordering that her property, movable and immovable, should be divided between them, all share and share alike; and she appointed Joseph Carrier, her husband, for the execution of that her will.

On the 18th April, 1829, Christiana McPhee died. On the 21st of August, 1830, the Court of Queen's Bench for the district of Quebec, upon the application of Joseph Carrier, representing that William Andrew Motz and Catherine Motz were still minors, appointed Joseph Carrier to be their tutor, and the Appellant to be their sub-tutor.

In this proceeding it is to be observed that the Appellant was treated as being of full age; and no notice was taken of

Lewis Harper, the tutor first appointed, although he was then living, and who did not die till some time in the year 1831.

Joseph Carrier, it appears, about the same time procured himself to be appointed the tutor, and Frederick Dion to be the sub-tutor of the infant, Joseph Carrier the younger; and on the 31st of August, 1830, an inventory was taken of the property of the community of Joseph Carrier and Christiana McPhee; the minors, William Andrew Motz and Catherine Motz, being represented by the Appellant, their sub-tutor, and Joseph Carrier, the younger, by his sub-tutor.

By this inventory it was made to appear that the whole property of the community between Joseph Carrier and Christiana McPhee amounted to £5,053.3s.2d, of which a moiety, amounting to £2526.11s.3d. belonged to the estate of Christiana McPhee, and under her will was to be enjoyed by Joseph Carrier during his life, and on his death to be divided in fifths between Joseph Carrier, Joseph Carrier the younger, the Appellant, William Andrew Motz, and Catherine Motz the share of each of these parties, therefore, according to the inventory amounted to £505.6s.3d.

This inventory appears to have been closed, so far as the infant, Joseph Carrier, was concerned, on the 17th of September, 1830; but it does not appear ever to have been closed so far as the Appellant and William Andrew Motz and Catherine Motz, were concerned.

Soon after the making of this inventory, and on the 27th of April, 1831, the Appellant, in consideration of the sum of £505.6s. 3d; then paid to him by Joseph Carrier (being the amount of his share of his mother Christiana McPhee's estate, as found by the inventory), and in consideration of Joseph Carrier undertaking to pay all the debts and expenses to which the share might be liable, assigned to Joseph Carrier all his rights both as heir of his father, and as heir and legatee of his mother, without any exception or reserve.

On the 3rd of October, 1831, Joseph Carrier married the Respondent, Henrietta Moreau, and there are several children of this marriage. On the 7th of December, 1833, William Andrew Motz assigned to Joseph Carrier all his rights as heir of his father, and as heir and legatee of his mother, in the same manner and for the same considerations as his brother. the Appellant, had done.

On the 9th of December, 1837, Catherine Motz died a minor, and intestate, leaving the Appellant and William Andrew Motz her heirs.

On the 4th of July, 1839, Joseph Carrier came to an account with William Andrew Motz in respect of his moiety of the sum of £505.6s.3d., appearing by the inventory to be the share

of Catherine Motz of the estate of her mother, Christiana McPhee. By this account it appears that Joseph Carrier charged William Andrew Motz with his share of a debt represented to have been due from the community, and not to have been included in the inventory, but to have been since paid by Carrier, and also with his share of the loss upon a debt due to the community, and included the inventory, but which had not been fully realized; and further with his share of the funeral and some other expenses of Catherine Motz. These sums were by the account deducted from the moiety of the £505.6s.3d; leaving a balance of £142.11s.3d. due to William Andrew Motz, of which he acknonledged the receipt, and he also signed a memorandum at the foot of the account, admitting in to be correct.

On the 30th of April, 1841, the Appellant came to a general settlement of accounts with Joseph Carrier and Joseph Carrier and the Appellant then signed a memorandum by which they acknowledged to have settled all accounts generally, of whatever description, between them, including what Joseph Carrier was accountable for to the Appellant, for his share of the succession of Catherine Motz, his sister; and they further acknowledged that the result of the settlement was that Joseph Carrier was debtor to James Motz in the sum of £76.5s.1d; and that Joseph Cairrier had paid that sum to the Appellant: and by this memorandum the Appellant confirmed and approved the account rendered by Joseph Carrier, of the succession of Catherine Motz, on the 4th of July, 1839 (being the account rendered to William Andrew Motz), and acquitted Carrier from that account, and from rendering any other account, discharging him from all claims and demands in respect of the succession of Catherine Motz, and from all other demands whatewer, which he had against him up to that day; and Carrier, on his part, acquitted and discharged the Appellant from all claims and demands which he had against him up to that day, whether for advances, or on any other accounts, and the parties mutually acquitted each other.

On the 2nd of September, 1851, Joseph Carrier died, having, by his will, dated the 21st of June, 1851, given and bequeated the whole of his estate, movable and immovable, to his wife, Henrietta Moreau, for her life or widowhood, and, subject to her interest, to his children by her, and their issue.

Soon after the death of Joseph Carrier, his widow, the Respondent, Henrietta Moreau, was apoointed tutor to her children, and she was afterwards also appointed tutor to the substition created by her husband's will.

On the 8th of March, 1852, William Andrew Motz assigned to the Appellant all his rights, shares and portions in the es-

tates and succession of his late father, mother, and sister. This assignment purports, on the face of it, to have been made for good value received ; but the particulars of the consideration do not appear on the face of the instrument.

On the 28th of June, 1852, the Appellant instituted the suit out of which this appeal arises, in the Superior Court of the District of Quebec, against Henrietta Moreau, in her own right, in respect of the community between her and Joseph Carrier, and as legatee under his will, and tutor to his children and to the succession created by the will, and against Joseph Carrier the younger, who seems to have been a formal party merely as legatee under the will of Christiana McPhee. The Appellant instituted this suit in his character of legatee of Christiana McPhee, and of assignee of William Andrew Motz, and of heir of Catherine Motz. By the declaration he impeaches the inventory of the 31st of August, 1830 ; the assignment by him of the 27th of April, 1831 ; the assignment by William Andrew Motz of the 7th of December, 1833 ; the account settled with William Andrew Motz on the 8th of July, 1839 ; and the account settled with himself on the 30th of April, 1841 ; and seeks to have those instruments and accounts declared to be void and of no effect, and in effect to have the accounts taken of the estate of Christiana McPhee and of the administration thereof, and to have her estate distributed and divided in fifths according to the directions of her will. The declaration also sought relief as to a moiety of a sum of £600 which had been the subject of a deed of donation by Joseph Carrier and Christiana McPhee to the Appellant and his brother and sister, and it further asked to have it declared that the community between Joseph Carrier and Christiana McPhee had not been determined, but was still subsisting ; but these two latter points were decided against the Appellant in the Superior Court, and there having been no appeal by him from the decision upon them, the points are not open upon this appeal. The grounds assigned by the declaration for impeaching the instruments and accounts in question are these : As to the inventory, that it was not made in the presence of Lewis Harper, the tutor of the minors Motz, and lawful contradictor ; that the character of tutor assumed by Joseph Carrier was an usurped character ; that the Appellant was not, in fact, subtutor of his brother and sister, and had been wrongly placed in that position by Joseph Carrier, he, the Appellant, being then a minor and under the power of Joseph Carrier ; that the inventory was incomplete, incorrect and false ; that Joseph Carrier had included in it, as part of the community, property of Christiana McPhee, and had not accounted for other property of hers which had been alienated by him during the community. As to the as-

signment of the 27th of April, 1831 ; that the consideration was less than half the value of the Appellant's share of the immovable property ; that Joseph Carrier had never accounted with the Appellant for his share of the successions of his father and mother, and could not legally deal with him in the matter, and that the consideration was founded on false and erroneous calculations, and was much below the value ; that the Appellant was then a minor, and that the transaction was with Carrier, who was the guardian of the Appellant's person and property, in his character of step-father and pro-tutor, and that it was, had, without any account rendered, accompanied by vouchers, and without any true and lawful inventory being made, and without the Appellant's having been put in the position of knowing the value of the property, and without the presence of a tutor *ad hoc*. As to the assignment of the 7th of December, 1833, precisely similar reasons were alleged. As to the account of the 4th of July 1839, the grounds assigned were, that it was informal, incorrect, illegal and incomplete, and that it was not accompanied by vouchers, nor sworn by Carrier to be just and true ; and as to the settlement of account of the 30th of April 1841, it was impeached upon the ground, that it had not been preceded by the rendering of any lawful account accompanied by vouchers, and had not been sworn to be just and true.

The Respondent pleaded to the action. The second plea was, that the action was wholly barred by the lapse of more than ten years, between persons of full age, and not privileged, since the several instruments and accounts sought to be impeached had been made and passed, and by the lapse of more than ten years since the Appellant and those whom he represented in the action had attained majority ; and by her fourth plea the Respondent put in issue all the facts of the case.

The Appellant replied to the second plea that the ten years prescription did not apply to the case ; Joseph Carrier having been the tutor, pro-tutor, and guardian of the Appellant and of his brother and sister, and not having rendered any account nor produced vouchers. And further that Carrier having had the usufruct of Christiana McPhee's property, during his life, the prescription did not begin to run till his death, and that the instruments and accounts sought to be impeached were affected by fraud and deceit, and that there could be no prescription in the case of fraud or deceit.

There is a great deal of evidence in the cause both on the one side and on the other, relating mainly to the ages of the Appellant and of William Andrew Motz, and to the extent and value of the property comprised in the community between Joseph Carrier and Christiana McPhee, and to the disposition of that property ; but in the view which Their Lordships have

taken of the case, it is not necessary to enter into an examination of this evidence. It is sufficient to observe that the Appellant was in the progress of the cause, examined on interrogatories exhibited on the part of the Respondent. That by the first of these interrogatories he was asked, whether he had not sworn in an affidavit which he had desired to file in support of his demand, that Christiana McPhee and Joseph Carrier had often told him that Jacob Pozer was largely indebted to the succession of the late John Motz, that is to say, in the sum of £500, currency, for money advanced and lent by the said John Motz in or about the year 1817; that the late William Fisher Scott was indebted to the succession of the late John Motz in the sum of £800 currency, for money lent to William Fisher Scott by the late John Motz; and that divers other sums of money were due to the succession by the late James McCullum and John Grout, to the amount of some hundred pounds currency; and that by the second of these interrogatories he was asked whether he had not sworn in the said affidavit, that he knew that the late Joseph Carrier and Christiana McPhee, after having bought a house in the lower town of Quebec in the month of August 1817, had still in their possession, belonging to them and forming part of their community, a very large sum of money, that is to say, the sum of £3,000, or thereabouts; and that at the death of Christiana McPhee in April, 1829, their fortunes had been augmented, and they had in their possession a sum of about £4,000, currency, in gold, silver, and bills of exchange, and that he counted the same, and that he enjoyed the entire confidence of his mother up to the time of her decease; and that his mother and Joseph Carrier had also belonging to them a large stock in-trade of the value of more than £2,000, currency, with other movables of the value of more than £1,000, currency, the whole estimated by him at a low value, besides debts to a considerable amount, independently of immovable property belonging to John Motz and to the community between Joseph Carrier and Christiana McPhee; and that the Appellant's answers to these interrogatories, were as follows: to the 1st interrogatory, " Yes; and in addition to those sums I omitted to mention the name of another person called to my memory since the closing of my enquêtes, by Mr. Hamel, road surveyor of this city; I allude to a person of the name of M'Eachan or M'Eachern, well known to the said Mr. Hamel, and of whom the said Joseph Carrier often spoke to me as being indebted to the estate of my late father, John Motz, in the sum of, I thing, £350, which, togetl er with the interest that would have acerued thereupon in the year, 1830, when Mr. Carrier made his inventory of the 31st of August,

would have amounted to about £500 or upwards, and which sum has not been entered by the said Joseph Carrier in his said inventory of the 31st of August, 1830; Plaintiff's exhibit n° 34, filed in this cause, that he, the said Joseph Carrier, received in hand, well and duly paid, from Mrs. W. F. Scott, wife of the said William Fisher Scott, the sum of £172. 17s. 7d. on account of some moneys lent by the said John Motz to the said William Fisher Scott, and that that amount was never entered in the said inventory notwithstanding that he, the said Joseph Carrier, had been collocated in the cause of *Grant* vs. *Vanfelson* and himself, the said Joseph Carrier, opposant, on the 17th of April, 1830, about one year after the death of the said late Christiana McPhee, and about four months before his said inventory. It appears, likewise, that he, the said Joseph Carrier, had been collocated in the cause of *Dalrymple* vs. *Scott*. and him, the said Joseph Carrier, opposant, for the sum of £250 currency, as appears by Plaintiff's exhibit n° 39, filed in this cause, neither of which has been entered in his said inventory of the 31st of August 1830; Plaintiff's exhibit n° 17." To the second interrogatory, "Yes; I attested to those facts in that affidavit, and I know them to be true, and called them to the recollection of the said Joseph Carrier about the time of the said inventory, in 1830. I likewise called to his recollection the circumstance of his having left home a short time before that period, and during his widowhood, and of his having left one of his iron chests (for he had two in the house at that time) wide open with the key in the lock thereof, which key remained in my possession from the Saturday afternoon, the day of his departure, until the following Monday, the day of his return, during which time the house was left under my charge and control. I counted upon that occasion, during his absence, upwards of three thousand pounds in gold, silver, and bank bills, which were inclosed in that iron chest. I told him at that time, about the time of the said inventory, that I had counted that sum in the iron chest, and that I knew that the estate of my late father and mother was worth more than he represented it to be. Whereupon he replied, "We have no time to think of these matters now; I only intend this inventory as a matter of form, I will make it all right hereafter I consider you as my own child, and have made you in my last will and testament one of my heirs." I told him that I knew he intended to do what was right, but again represented unto him that I knew the estate of my late father and mother was worth more than he represented it to be, upon which he got annoyed, and replied, that he was not obliged to render me any account whatever of the succession, that he had the usufruct and enjoyment thereof during his

lifetime, and that if I did not hold my tongue he would not give me a fraction, but that if I trusted to him he would carry out my mother's will, as ordered by her in the will itself. Shortly after my mother's death he turned me out of doors, and compelled me to provide for myself, and to abandon the study of my profession, which profession I had studied for the space of two years and nine months, with Mr. M'Pherson, notary public; he gave me no means of supporting myself, and left me completely destitute; he knew of my embarrassed circumstances, and that I was largely indebted for boarding, lodging, clothing and for maintaining the ordinary necessaries of life; and in the month of April, 1831, he inveigled me into making a *transport de droits successifs*, filed in this cause as Plaintiff's exhibit n° 13, and which I was compelled to do, and did, in my desperate circumstances with the understanding that my mother's will should be carried out after his death, as had been ordered therein by herself. I was obliged to make this *transport de droits successifs* because I had no means whatever to procure the ordinary wants of life; this transport was made without a *reddition de compte*, without the presence of my tutor nor of a tutor *ad hoc*, without any of the formalities required by law, *non visis tabulis*. It was, therefore, only after the death of the said Joseph Carrier, which took place in 1851, and when I saw his last will and testament, that I could discover and became aware of the frauds and deceit that he had been guilty of towards me in our transaction and that I found out that I had been inveigled into those transactions, by his deceitful dissimulations, delusive language, and plotting intrigue,"

In this state of circumstances, the Superior Court by its decree declared the instruments and accounts impeached by the declaration, to be null and void, and, in effect, decreed the accounts prayed by the Appellant, Appellant accounting for what had been received by him and those whom he represented, with interest; but, as to the deed of gift and the continuance of the community, the Superior Court dismissed the Appellant's claims. The Court of Queen's Bench, on the other hand, dismissed the suit, saving to the Appellant any remedy he might have by special action.

In disposing of this case Their Lordships do not think it necessary to enter into the question of the age or non-age of the Appellant and *William Andrew Motz* at the respective periods when the assignments to *Joseph Carrier* were made by them, or into any examination of the evidence as to the truth or falsehood of the inventory, or as to the extent or value of the property comprised in the community between *Joseph Carrier* and *Christiana McPhee*. They are fully satis-

fied that the inventory was not correct, and they are not less satisfied that, whether the Appellant was of age at the date of the inventory or not, and whether the Appellant and William Andrew Motz were of age, or under age, at the times when they made the assignments to Joseph Carrier, those assignments were made by them so soon after they had attained their majority, and under such circumstances, that standing by themselves, without reference to any question of time or conduct, they could not possibly be maintained, according to the law of Lower Canada.

Neither do Their Lordships think it necessary, in determining this case, to enter into the question so much discussed in these papers, and debated in the argument at the bar, whether the ten years' prescription does or does not bar the Appellant's claims. They assume in favour of the Appellant that it does not: but claims, although not barred by prescription, may be extinguished by release, or destroyed by conduct operating as a release; and Their Lordships are of opinion, that the claims made by the Appellant in this suit have been so extinguished or destroyed.

It appears fron the passages which have been read from the Appellant's answer to the Respondent's interrogatories, that the Appellant throughout knew that the inventory on which all the subsequent transactions complained of in this suit were based, did not contain a just and true account of the property of the community between Joseph Carrier and his mother, Christiana McPhee; that it was full of errors and omissions. With knowledge of these facts, he dealt with Joseph Carrier, and, several months after the date of the inventory, during which the relations between them appear, from his statement, to have been by no means amicable, he completed with Carrier the transaction of the 27th of April, 1831.

That transaction was not a mere transaction of account and payment. The Appellant had at that time no right to claim any payment whatever. It was a transaction not merely of account and payment, but of sale and purchase. It was a sale and purchase upon terms which might or might not turn out to be beneficial to the Appellant, according to the duration of Joseph Carrier's life, upon the determination of which the Appellant's interest depended.

These considerations, however, are not, as has been already said, sufficient in Their Lordships' judgment to justify the conclusion that the transaction, standing by itself, could have been supported; but the transaction could at any time have been impeached by the Appellant. He might at any time have sued to set it aside. He took no such proceeding, nor, so far as appears from the evidence, even intimated any dissent

from the transaction during the whole of Carrier's life. During the whole of that period he adhered to the transaction, and took the benefit of it; and not only so, but in April, 1841, he settled all accounts with Carrier, and signed a memorandum which, if it does not amount to an absolute release, at all events approaches so closely to it that it can scarcely be considered in any other light. There is no pretence for saying that the Appellant was at this time in any degree under the influence of Carrier. He was at this time independent of any such influence, of mature age, and fully competent to judge what it was most for his interest to do; and he then deliberately adopted this course. Their Lordships are of opinion that he must abide by it. He says that he entered into the transaction of 1831 upon the faith of promises made to him by Carrier that he would, by his will, carry out the dispositions which had been made by his wife, Christiana McPhee; and it was said for the Appellant at the bar that by the law of Lower Canada the transaction of 1831, was wholly null and void, and did not admit of confirmation; but Their Lordships cannot impute to the Appellant, more especially as he seems to have been brought up to the profession of the law, that he did not know that a will was a revocable instrument, and they find it impossible to suppose that the Appellant could have acted upon the promises which he alleges to have been made to him by Carrier, when they find that Carrier turned him out of the house shortly after his mother's death, and that not only is there no proof of any reconciliation between them, but that there appears to have been litigation between them, in the year 1844, upon the subject of the deed of donation of £600, to which allusion has been made. And, with respect to what was said as to the law of Lower Canada upon the subject of confirmation, however strong the law may be upon that subject, Their Lordships do not find that it disables parties from releasing their rights, or from disentitling themselves by their conduct from enforcing them. The question here is not whether the inventory was null and void, and incapable of confirmation, but whether the assignment made by the Appellant can now be set aside; for if the assignment stands the Appellant's rights are gone. Looking at the case in this point of view, it was said for the Appellant that he was not bound to sue until the death of Carrier, when his interest came into possession, and this may well be so; but although the Appellant may have been entitled to institute the suit, it does not follow that he was entitled to succeed in it: and seeing that the transaction of 1831, was entered into with full knowledge on the part of the Appellant that the inventory was not correct, and was followed by the transaction of

1841, which, in Their Lordships' judgment, was, or was tantamount to a release, they are of opinion that the Appellant was not so entitled to succeed. In order so to entitle him he was bound, as Their Lordships think, to show that the transaction of 1841, was open to impeachment, as the original transaction had itself been, and in Their Lordships' opinion he has failed to do so. The transaction of 1841, was not a mere sequence of the original transaction; it was, in some respects, a new and independent transaction. It cannot have proceeded upon the faith of the inventory, for the Appellant knew the inventory to be incorrect. It cannot be affected by any considerations of influence or control arising from the relation between the parties, for the Appellant had long been emancipated from any such influence or control. Their Lordships are satisfied that the Appellant when he entered into this transaction well knew that the original transaction was open to impeachment, and deliberately determined that it was more for his interest to release than to prosecute his claims. In cases of this nature the position in which the person whose title is sought to be impeached has been placed, must always be borne in mind, although it may not decide the question whether the transaction ought to be set aside. In this case the Appellant has abstained from suing to impeach these transactions until the death of Carrier, by whom, had he been living, they might have been elucidated and explained.

Upon these grounds Their Lordships are of opinion, that the Appellant's claims, so far as respects his individual interests, cannot be maintained. The same reasons which preclude the Appellant's individual claims seem to Their Lordships to preclude also his claims as co-heir of his sister. The claims set up by the Appellant as assignee of his brother William Andrew Motz, have appeared to Their Lordships to be more open to consideration; but William Andrew Motz settled accounts with Joseph Carrier upon the footing of the inventory knowing, as appears by the account itself, that the inventory was not correct, and Their Lordships, therefore do not think that this part of the case can be distinguished. They give no opinion upon the question whether such an assignment can in any case be made the foundation of a suit, but they think it right to say that assignments taken as this have evidently been, for the mere purpose of prosecuting a suit, are not entitled to any favourable consideration.

Upon the whole, therefore, Their Lordships will humbly recommand Her Majesty to dismiss this appeal; but Their Lordships highly disapprove of transactions of this description entered into by persons standing in confidential relations; and upon this ground, and upon the ground of there having been

a difference of opinion in the courts in Canada, and to some extent between the Judges of the court from which this appeal comes, they will humbly recommend that the dismissal be without costs.

A petition was afterwards presented (1) by the Appellant for a re-hearing of the appeal on the ground that the judgment of Their Lordships was founded on documents which were not properly before the court. The petition alleged, that the judgment of Their Lordships was founded upon certain interrogatories and answers which had been, at the instance of the Respondent, and in conformity with the practice of the courts of Lower Canada, excluded from being used as evidence in the cause. That by the practice of the courts of Lower Canada when interrogatories were administered to one of the parties to a suit, the party administering such interrogatories could elect to use or not the interrogatories and answers as evidence in the suit, and that in the event of the party administering such interrogatories electing not to use the same, such party moves for an acte of the court of not using such interrogatories and answers, which is a matter of course, and that thereupon the interrogatories and answers are excluded from being used or referred to as evidence in the suit, but that the acte of the court was laid before the court with the other documents. That the Respondent had administered interrogatories to the Appellant which had been answered, but had afterwards elected to withdraw them, and had on the 4th of April, 1855, moved for and obtained an acte for that purpose. That the clerk of Appeals of the Court of Queen's Bench, in Canada, omitted to transcribe the Respondent's declaration of not using the answers to such interrogatories in the record transmitted to Her Majesty's Privy Council, in consequence of which the Petitioner submitted, that there had been a miscarriage of justice; for had the Respondent elected to make use of the answers and interrogatories as evidence in the court below, the Petitioner knowing the incorrectness of the inventory to which they referred, would have adduced further evidence to show the information to which they referred, that was in most part recently acquired, but that as the Respondent had elected not to use the answers to interrogatories, but to stand upon the alleged correctness of the inventory, taken and admitted in the cause, it was unnecessary and improper for him to adduce further evidence, and he submitted that the Respondent should be held bound by his election, or that

(1) 6th February, 1861; Present: The Right Hon. Lord Kingsdown, the Right Hon the Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

he should be allowed to give further evidence before the appeal was finally adjudicated.

In support of this petition, the Appellant filed an office copy in the Superior Court in Lower Canada of the motion made on the 4th of April, 1855, which purported to be "*pour acte de ce que la Défenderese, ne se sert pas des réponses du Demandeur aux interrogatories sur faits et articles;*" with an affidavit setting forth the practice of the court in Lower Canada, and stating that it appeared from the list of documents sent to England annexed to the printed record in the appeal, that the clerk of Appeals had omitted to send to England the above acte of court, but that its title was inserted in the list of documents, and that the interrogatories and answers were marked as "omitted."

Upon this petition and affidavits, Mr. R. Palmer, Q. C., moved for a re-hearing.

He submitted, that it clearly appeared, that Their Lordships' judgment proceeded on the interrogatories and answers, which were not in evidence in the action, although upon the file of the court, and was improperly included in the printed transcript sent from Canada, while from a further error of the clerk of Appeals, the acte made on the 4th of April, 1855, of the Respondent's declaration not to use the interrogatories and answers, was omitted. That no reference had been made in the printed cases by either side to those documents, as both parties were aware that they could not be used. Upon the question of allowing a re-hearing of an appeal, he referred to *Rajundernarain Rae* vs. *Bijia Govind Sing* (*a*), *Sedgwick* vs. *Hitchcock* (*b*), and as to correcting by a bill of review a decree obtained fraudulently, or in error, he cited the *Earl of Brandon* vs. *Becher* (*c*), *Tommey* vs. *White* (*d*).

The Lord Justice TURNER.

Their Lordships are of opinion, that it is impossible for them now to give relief in this case. No doubt the Appellant thought it for his advantage to have the interrogatories, and the answers inserted in the transcript of the appeal and treated as part of the case, on account of the statements being favourable to his case; and intended to take the opinion of the court upon that evidence, and to take the benefit of it if it should turn out to his advantage. Now, we are of opinion, upon that ground alone, irrespective of the question of law and practice, the allegations in the petition in this respect is insufficient. We do not think there is any hardship in this case, looking at what the Appellant had himself shown in his ans-

(*a*) 1 Moore's P. C. Cases, 117.

(*b*) Lord's Journ., 14 Vol., 601.

(*c*) 3 Clk. & Fin., 479.

(*d*) I H. L. Cases, 160.

wers to interrogatories. But Their Lordships have, we apprehend, no power, in a case of this description to recommend to Her Majesty a re-hearing without directing some inquiry as to what knowledge the Appellant had of the facts at the time of the hearing. (13 *Moores' Privy Council Rep.*, p. 376.)

APPEL.—CAUTIONNEMENT.—AVOCAT.

SUPERIOR COURT, Quebec, 6 décembre 1852.

Before BOWEN, Chief Justice, and MEREDITH, Justice.

ROUTIER, Appellant, and GINGRAS, Respondent.

Jugé : Qu'un avocat ou procureur pratiquant ne peut pas être caution judiciaire dans une procédure du ressort de la Cour Supérieure.

This was an appeal from the Circuit Court. Appellant had given the security required by the Statute ; but one of his bail was a Barrister practising before the Superior Court.

Respondent moved that the appeal should be dismissed, inasmuch as the bail-bond was illegal, it being entered into by a person in direct contravention to a rule of practice. The rule (6th rule of the S. C. L. C.) is as follows : " No barrister or attorney, prothonotary, sheriff, crier, bailiff or sheriff's officer, shall be bail or surety in any action or proceedings cognizable by this court, or by any judge thereof."

PER CURIAM : This is a long established rule, in English jurisprudence, as well as in the jurisprudence of this country. It existed in the former rules of practice, and we think it a beneficial one, which ought to be enforced ; it has been found to be salutary, as well on public ground, as for the protection of the Bar itself. Rule absolute and appeal dismissed. (3 *D. T. B. C.*, p. 57.)

STUART and VANNOVOUS, for Appellant.

TESSIER, U. J., for Respondent.

ENQUETE.—TEMOIN.

SUPERIOR COURT, Québec, 22 décembre 1852.

Before DUVAL and MEREDITH, Justices.

ROE *vs.* JONES.

Si un témoin est en dehors de la juridiction de la cour, sa déposition faite dans une cause précédente pourra être produite dans une cause subséquente, les matières en litige étant les mêmes.

Action for a malicious arrest.

Defendant had issued a *cap. ad res.* against Plaintiff, on the ground that he was indebted to Defendant in a large sum of money, and was about to leave the Province, with intent to defraud Defendant. The main question in the suit was the existence or non-existence of the debt for which Plaintiff had been arrested. At the former trial, one Thomas E. Jones was examined, touching the account between the parties, upon which the demand of Defendant was based, and, soon after giving his testimony, left the Province, to reside in the State of New York.

At the *enquête,* Plaintiff having established, by affidavits, the witness Jones' departure from the Province, and actual residence in New York, proposed to place on the record his deposition in the former suit (1).

STUART, OKILL, for Defendant : The deposition cannot be read or produced, until after Plaintiff has shewn that he cannot obtain the attendance of the witness ; Plaintiff may issue a commission, and without difficulty procure his evidence in New York, and, therefore, the deposition offered is not *the best evidence* in the Plaintiff's power to give ; although the parties in the present and former suit are the same, the points at issue are not identical ; and, if the witness himself were produced or examined by commission now, Defendant might bring out other and important facts material to this issue and not to the former.

HOLT, in reply : Plaintiff is not bound to call up witnesses for Defendant, and, if Defendant wishes to give in evidence other facts, within the knowledge of this witness, to which he has not testified on the former occasion, Defendant should have called him as a witness himself ; Plaintiff has no means of compelling the attendance of the witness, and to entitle Plaintiff to produce and file the former deposition of the witness, he

(1) Authorities cited on behalf of the Plaintiff : 1 Greenleaf on Evid., § 553 ; 2 Starkie on Evid., P. II, pp. 261, 262 ; 3 Taunton, 262, Doncaster (*Mayor of*) vs. *Day ;* Buller's N. P., 242 ; 3 Cond. Louis. Repts, 350, *Hennen* vs. *Monro ;* 4 Cond. Louis. Repts., 237, *Miller* vs. *Russell.*

is only bound to establish that he is residing in a place beyond the jurisdiction of the court.

Plaintiff's application was supported by authentic copies of the pleadings and exhibits in the former suit : DUVAL and MEREDITH, Justices, ruled that, inasmuch as it was shewn that the residence of the witness was *beyond the jurisdiction of the court*, and that the same matter (the indebtedness of Plaintiff) was in issue, the former deposition might be produced. (1) (3 *D. T. B. C.*, p. 58.)

HOLT and IRVINE, for Plaintiff.

STUART, for Defendant.

CERTIORARI.—CONTRAINTE PAR CORPS.

COUR SUPÉRIEURE, Québec, 11 janvier 1853.

Présents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

Ex parte DAVIES, Requérant pour un writ de certiorari.

Un magistrat n'a pas droit de refuser de faire un *retour* à un *writ* de *certiorari*, parce que les honoraires du greffier de la paix sur tel procédé n'ont pas été payés, mais une demande pour contrainte contre lui ne sera point reçue de suite et sans avis préalable. (2)

Dans cette instance, Davies est condamné à une amende (pour avoir vendu sans licence) par John Maguire, magistrat de police ; il obtient un *writ* de *certiorari*, le place entre les mains du magistrat, et néglige de payer la somme de vingt chelins, dus au greffier de la paix, pour préparer la conviction et le retour, en vertu d'un tarif fait par les magistrats ; pourquoi, le magistrat refuse d'obtempérer au *writ* de *certiorari*. De là, une procédure de la part de Davies, pour une contrainte par corps contre le magistrat.

La cour est d'opinion que la doctrine émise par Lord Mansfield, dans *Rex* vs. *Bury*, T. T. 1778, 1 Doug. 194, savoir que le magistrat ne peut refuser de rapporter le *writ* de *certiorari*, parce que les honoraires du greffier n'ont pas été payés, n'a jamais été mise de côté, et doit être suivie ; mais elle est aussi d'opinion que le magistrat devait être mis en demeure de faire rapport du *writ* ; et qu'avis devait lui être donné qu'une demande pour contrainte par corps serait faite contre lui, et qu'une règle à cet effet n'aurait pas dû être octroyée *de plano* ; pour ces raisons la règle pour contrainte est déboutée, quant à

(1) 2 Evans Pothier, 229 ; Harrison's Digest, Evidence, 2870.

(2) V. art. 1229 C. P. C.

présent. Subséquemment la cour, sur une nouvelle procédure, enjoint péremptoirement au magistrat de faire rapport du *writ*, et ce *writ* est, en conséquence, rapporté. (3 *D. T. B. C.*, p. 60.)

SMITH et SECRETAN, pour Davies.

ROSS, DUNBAR, pour le Magistrat.

DECONFITURE.—INSOLVABILITE.—FRAUDE.

BANC DE LA REINE, EN APPEL, Montréal.

Présents : SIR JAMES STUART, Bart., Juge en chef, ROLLAND, PANET et AYLWIN, Juges.

BRYSON et al. (Opposants en Cour Inférieure), Appelants, *et* DICKSON (Demandeur et Opposant en Cour Inférieure), Intimé.

Jugé : 1. Que, du moment de la faillite, les biens du failli deviennent la propriété absolue de ses créanciers d'alors ; que la reconnaissance d'une dette ou la confession de jugement de ce failli en faveur d'une personne ne font pas preuve de la dette à l'encontre des créanciers, et sur leur contestation de cette réclamation sur allégué de fraude et collusion, ce Demandeur est tenu de faire preuve de sa dette et des considérations de cette dette, lors de l'inscription de la cause à l'enquête.

2. Que le paiement par un tiers de sommes dues par un tel failli ou débiteur insolvable, sans transport ou subrogation, étant une créance postérieure à la déconfiture déclarée ne donne pas droit à ce tiers d'être colloqué utilement sur les biens de ce failli, et qui étaient sa propriété lors de telle faillite.

3. Que la preuve n'ayant pas été faite à l'enquête régulière, ne pouvait être reçue lors d'une enquête ordonnée par la Cour d'Appel sur des exceptions que la Cour Inférieure avait rejetées et que la Cour d'Appel avait maintenues.

La contestation était entre Bryson et al., Opposants à la distribution des deniers provenant de la vente des meubles de Sawtell, vendus sur exécution à la poursuite de Dickson, et ce dernier qui avait obtenu jugement sur la confession de Sawtell, pour la somme de £1272 2s. 8d., savoir : £635 15s. 6d., montant de deux billets promissoires allégués avoir été faits le 13 juillet 1849, et £636 7s. 2d. pour deniers payés et déboursés par Dickson pour Sawtell.

Le rapport du greffier, après collocation des frais privilégiés, et d'une opposition de Dickson, réclamant £87 10s. pour loyer de la maison où étaient les effets exécutés, partageait le surplus des deniers, au denier la livre, entre le Demandeur et les autres Opposants.

Les Appelants contestèrent d'abord la collocation de Dickson pour loyer. Ils contestèrent également la collocation au denier la livre de Dickson, par deux plaidoyers distincts ; le premier

alléguait la déconfiture de Sawtell, antérieurement à la date des billets, dont la dation, pas plus que la confession de jugement, ne pouvait faire preuve à l'encontre de Bryson et al., et qui ne pouvaient avoir d'effet à leur préjudice. Ils niaient que Sawtell fût endetté à Dickson, et qu'il y eût aucune cause ou considération pour les billets en question ou la confession de jugement. Ils impugnaient de fraude et de collusion, entre Dickson et Sawtell (qui étaient parents) les billets en question et la confession de jugement, et enfin, ils alléguaient que Sawtell avait, depuis cinq ans, payé entre les mains de Dickson plus de £1500, deniers qui appartenaient aux créanciers de Sawtell ; et que les avances que Dickson lui avait faites étaient peu considérables, et avaient été payées et satisfaites depuis longtemps, par les deniers que Dickson avait ainsi reçus.

Le second plaidoyer énonçait une société de commerce entre Dickson et Sawtell ; et que cette société existait encore dans le commerce que faisait Sawtell ; qu'ils étaient également tenus au paiement de la créance de Bryson et al. Que Dickson avait soustrait des sommes considérables et beaucoup d'effets de la société ; et avait souvent déclaré qu'il ne ferait aucune réclamation.

Les conclusions de ces plaidoyers demandaient la réformation du rapport de distribution, la nullité du jugement, et que la prétendue créance de Dickson fût déclarée frauduleuse et mal fondée.

Dickson répondit généralement en droit en fait, et, sur une audition en droit, la Cour Supérieure maintint le premier moyen de contestation, et débouta le second comme insuffisant en loi.

La cause inscrite à l'enquête, les Appelants notifièrent l'Intimé de prouver la considération pour laquelle avaient été donnés les deux billets dont les Appelants contestaient la validité, mais l'Intimé n'en fit rien, et les Appelants prouvèrent leur créance, antérieure à la déconfiture de Sawtell, qui avait eu lieu au printemps de 1849, à la connaissance même de l'Intimé ; qu'ils avaient, pour le recouvrement de leur créance, intenté contre le Défendeur une action qui fut contestée ; et qu'à la veille de la prononciation du jugement, ce dernier vint à Montréal pour recevoir signification de la demande de l'Intimé et nonobstant l'insuffisance des délais d'assignation, confessa jugement en faveur de l'Intimé, pour la somme demandée.

Dickson, considérant que les conclusions de l'opposition des Appelants, *aux fins d'être colloqués au marc la livre*, comportaient une admission de sa créance, inscrivit la cause pour audition au mérite, et, le 7 janvier 1851, la Cour Supérieure rendit jugement, par lequel, considérant qu'au temps de l'obtention du jugement, par l'Intimé contre le Défendeur, ce

dernier était insolvable, au su du dit Intimé, et que le jugement et la confession sur laquelle il avait été rendu, avaient été ainsi faits et rendus lorsqu'il n'y avait aucune autre dette que celle de £635 15 6, montant des deux billets promissoires en question, et que la confession et le jugement étaient, pour le surplus, une fraude à l'égard des créanciers du Défendeur, et qu'en conséquence le dit Intimé ne pouvait être colloqué, en vertu du dit jugement, pour plus forte somme que £635 15 6, avec intérêt et dépens, maintint la contestation des Appelants, et ordonna que le rapport de distribution fut réformé, en réduisant la créance du dit Intimé à la somme de £635 15 6.

De ce jugement les deux parties appelèrent ; Dickson, afin d'être réintégré dans la totalité de sa demande, et les Appelants pour se faire relever du jugement rendu sur l'audition en droit, le 16 juillet 1850, afin de faire rejeter en entier la demande de Dickson, et, le 11 juillet, 1851, la Cour du Banc de la Reine, adjugeant sur les deux appels, prononça comme suit : " Considérant que les moyns ou raisons de contestation, " opposés par Bryson et consors, à l'encontre du rapport de " distribution en cette cause, étaient et sont bien fondés en " droit, et, dans le cas où ils seraient prouvés, suffiraient, non " seulement pour détruire la créance de Dickson en entier, " mais établiraient de plus une obligation personnelle de sa " part, comme associé du Défendeur, de payer en entier la cré- " ance de Bryson et consors, et qu'il y a erreur dans le juge- " ment du 16 juillet 1850, maintenant la réponse en droit " (*demurrer*) à ces moyens ; et, considérant que Bryson et con- " sors avaient et ont droit de faire la preuve au soutien de ces " moyens, tant pour maintenir leur droit d'être colloqué de " préférence à Dickson, dans la distribution des deniers préle- " vés par la vente des meubles et effets du Défendeur, que " pour établir l'obligation de Dickson de leur payer la totalité " de leur créance : La cour infirme, tant le jugement interlo- " cutoire que le jugement final rendu par la Cour Inférieure, " et procédant à rendre le jugement que la Cour Inférieure " aurait dû rendre, déboute la réponse en droit (*demurrer*) " plaidée par le dit Dickson, et ordonne, que, sans toucher au " témoignage déjà pris, mais le laissant subsister au dossier, " l'enquête soit rouverte, pour procéder à la preuve sur les " moyens de contestation, avec dépens contre Dickson : Et ad- " jugeant sur l'appel du dit James Dickson du jugement final " rendu en Cour Inférieure, considérant que Dickson n'était " et n'est pas lézé par le dit jugement, déboute son appel.

La procédure remise à la Cour Supérieure, les Appelants inscrivirent la cause, pour enquête, le 1er octobre 1851. Ce jour-là, ils déclarèrent leur enquête close, sans faire aucune preuve additionnelle ; et l'enquête de l'Intimé fut, par le juge

présidant aux enquêtes, fixée au 13 du même mois. Les Appelants excipèrent à cet ordre, et une motion par eux faite en cour pour reviser cet ordre, fut rejetée le 14 octobre. Le 23, l'Intimé procéda à son enquête, établissant que la société qui avait existé entre lui et le Défendeur, avait été dissoute en 1846, et que quoiqu'ayant droit à un tiers des biens, dont la valeur était d'environ £1500 ou £1600, il n'avait emporté que pour environ £200 ou £300. Il produisit de plus un état de sa créance de £636 7s. 2d., et dix documents au soutien de cet état. Les Appelants objectèrent à l'enfilure de ces papiers, comme étant étrangers aux moyens de contestation sur lesquels la Cour d'Appel avait ordonné la preuve ; néanmoins, la cour les reçut *de bene esse*. L'Intimé compléta sa preuve, en établissant que cette créance de £636 7s. 2d. était composée des sommes dues par le Défendeur à divers individus, dont Dickson avait acquis les créances en leur payant 10s. dans le louis.

Sur ce, l'enquête fut close, et les parties entendues au mérite le 11 mai 1852. La Cour Supérieure, après avoir examiné le jugement rendu en appel et la preuve faite, renvoya l'objection faite par les Appelants à la production des papiers et documents filés par l'Intimé, et, considérant que les Appelants n'avaient pas prouvé les allégués contenus en leur contestation, et que le Demandeur avait établi en preuve, qu'au temps de l'institution de son action contre Sawtell, et, lors du prononcé du jugement sur icelle, le Défendeur Sawtell était justement endetté à l'Intimé en une somme égale à, et excédant même celle pour laquelle le jugement avait été rendu, savoir, £635 15s. 6d. pour les deux billets, et £636 7s. 2d. pour deniers payés et déboursés pour le Défendeur et à sa réquisition, débouta la contestation, et homologua et confirma les 4e et 5e collocations du rapport de distribution, se montant à £611 9s. 6d., qu'elle ordonna de payer comme suit, savoir:

A l'Opposant, James Dickson, montant de son opposition pour loyer des lieux où ont été saisis les meubles et effets vendus en cette cause, £87 10 0 ; Frais d'opposition, £2 10 0 ; Au protonotaire. £0, 11 8.

Au Demandeur, James Dickson, dont le jugement rendu en cette cause le 1 avril 1850, se monte, en principal, intérêt et frais, jusqu'au 12 juin 1850, à £1,030 5 6, pour son dividende £520 14 10 = £611 9 6

Contre ce dernier jugement, les Appelants se pourvurent de nouveau en appel, alléguant que la Cour Supérieure, par ce jugement, avait adjugé sur deux contestations dont une seule était soumise. Que sur cette dernière, les deux cours avaient déjà décidé en faveur des Appelants, au montant de £636 7 2, c'est-à-dire, cette partie qui n'était pas fondée sur les billets,

que l'enquête n'avait été rouverte qu'en faveur des Appelants, et pour leur donner occasion de faire mettre au néant la partie de la demande de l'Intimé que la Cour Supérieure avait admise, et non pour donner occasion à l'Intimé de réparer les omissions qu'il avait pu faire dans sa preuve ; que l'Intimé n'ayant pas prouvé dans l'origine la considération des billets dont il demandait le paiement, ne pouvait ni en recouvrer le montant ni obtenir permission de prouver cette considération en contre-preuve, et que, d'ailleurs, cette permission n'aurait pu être donnée qu'à la condition de laisser les Appelants faire une preuve contraire, ou même de plaider *de novo,* s'ils le jugeaient à propos. Ils alléguaient encore que les billets n'avaient en loi aucune date, et que rien n'établissait qu'ils eussent été donnés avant l'action intentée (ils n'ont pas été produits avec l'action, n'ont même jamais été produits ni prouvés) et comme ils portaient une date subséquente à la déconfiture de Sawtell, ils auraient dû être considérés par la Cour Supérieure de la même manière que l'autre somme réclamée par l'Intimée.

La Cour du Banc de la Reine a donné gain de cause aux Appelants.

Sir James Stuart, Baronnet, Juge en Chef, après avoir énoncé les faits de la cause, et faisant allusion à la question de déconfiture, fraude et collusion, soulevée par les Appelants, remarqua : Sur cette question on n'a pas adopté la marche régulière. Le remède donné par la loi en pareil cas est la tierce opposition, seul mot strictement légal. Néanmoins, on ne s'est pas prévalu de cette irrégularité, et les parties ayant lié contestation, il est du devoir de la cour de juger la question telle qu'elle se présente. La contestation des Appelants énonce qu'il n'y a pas eu de considération pour les billets en question, et qu'il n'y avait pas de cause pour la créance portée par le troisième chef. Cette cour avait à s'enquérir de la validité des réclamations. Lorsque la faillite arrive, les biens du débiteur deviennent la propriété des créanciers, et il ne peut faire aucun acte à leur détriment. Quant aux billets, il était loisible aux Appelants d'opposer qu'ils avaient été donnés sans considération valable ; c'est ce qu'ils ont fait, et il devenait alors du devoir de Dickson de prouver une considération valable. Il ne l'a pas fait, et dès lors les billets doivent être considérés sans valeur par défaut de considération. Quant au montant réclamé par le troisième chef, la preuve aurait dû en être faite lorsque la cause fut inscrite la première fois pour enquête sur la contestation entre les parties. La procédure a été renvoyée à la Cour Inférieure pour la preuve sur le second plaidoyer : et, nonobstant, l'Intimé n'a fait preuve que d'une créance personnelle qui n'a pris naissance que depuis la faillite, et

conséquemment ne pouvait lui donner droit d'être colloqué utilement sur la masse de cette faillite, car il n'appert d'aucun transport par les créanciers payés à Dickson, il n'a pas été subrogé en leur lieu et en leurs droits, et il ne peut réclamer que comme *negotiorum gestor*, pour les paiements par lui faits subséquemment à la faillite pour l'avantage du débiteur. Dickson ne pouvait donc réussir sur ce point, et le jugement de la Cour Supérieure doit être infirmé.

Le jugement en appel est comme suit: " The court, considering that it appears that Respondent recovered judgment against Thomas Sawtell, on the confession of him said Thomas Sawtell, on the first of April, one thousand eight hundred and fifty, for two several sums of money, namely, for six hundred and thirty-five pounds, fifteen shillings and six pence, as being the amount of two promissory notes made by Sawtell, to and in favor of Respondent, and bearing date, respectively, the thirteenth day of July, one thousand eight hundred and forty-nine, and for six hundred and thirty-six pounds, seven shillings and two pence, for money laid out, expended and paid by Respondent for Sawtell, at his request, making together the sum of one thousand two hundred and seventy-two pounds, two shillings and eight pence; and, considering that it appears that Appellants, by their contestation of the report of distribution, sought to cause said judgment to be set aside, as to them Appellants, as having been rendered by collusion for debts not due, and in fraud of the rights of them Appellants, as creditors of Sawtell; and considering that, before and at the time of the making of notes, and also before and at the time of the institution of the action in which said judgment was rendered, and before and at the time of the making of said confession, and the recovering of said judgment, Sawtell was in a state of open declared insolvency and bankruptcy, of which Respondent had notice and was aware; and considering that, by said contestation, Appellants, among other things, pleaded that said promissory notes were given, without consideration, and that the alleged debt for monies laid out, expended and paid by Respondent for Sawtell, was never incurred or due by or from Sawtell to Respondent, which plea, in a case of alleged and presumed fraud, as in this case, and under the issue in this cause joined on said contestation, made it incumbent on Respondent to prove the consideration (if any) for which said notes were made and given, and also the cause of action set forth in the third count of his declaration, namely, that moneys were laid out, expended and paid by him Respondent, for Sawtell, at his request, and to the amount stated in his declaration; and considering that no evidence has been adduced by Respondent that any consideration was given for said notes,

nor has any evidence been adduced by him, within the time in which it could be lawfully adduced of the said cause of action set forth in the third count of his declaration; and considering also, that if the cause of action in the said third count had been proved, it would have afforded no right to Respondent to be collocated in the judgment of distribution in this cause, inasmuch as such cause of action would constitute a personnal debt of Sawtell, incurred after his bankruptcy, for which Respondent could not claim a dividend out of the proceeds of the property of the bankrupt, of which he was possessed at the time of his bankruptcy, which on his bankruptcy, became exclusively vested in and belonged to his creditors who were such creditors before and at the time of his bankruptcy; and considering that the material allegations of Appellant, on said contestation, to the effect that the said judgment was obtained collusively by and between Respondent, and Sawtell for alleged debts not due, and in fraud of the rights of them Appellants as creditors of Sawtell, have been proved by legal and sufficient evidence; and considering also that, by the judgment of this court, rendered in this cause, on the eleventh day of July, one thousand eight hundred and fifty-one, it was expressly adjudged, that the *enquête* should be re-opened for the adduction of evidence on the second and third *moyens*, or grounds of contestation, without permitting evidence on any other of the grounds of contestation in respect of which the *enquête* had been closed; and considering also that the admission of the evidence adduced, after the remittance of the record, from this court to the court below, in October, one thousand eight hundred and fifty-one, was not authorized by said last mentioned jugment, and cannot be sustained; and considering also, that Respondent, has been prematurely and erroneously collocated in said report of distribution for a certain sum for rent, although the proceedings on his opposition preparatory to hearing and judgment thereon were not yet completed, and although no hearing was had on the same; it is adjudged, that the judgment appealed from, rendered on the eleventh day of May, one thousand eight hundred and fifty-two, and also the judgment or order of the judge proceeding at the *enquête* made on the fourteenth day of October, one thousand eight hundred and fifty-one, and also the judgment or order of the court below made on the fifteenth December, one thousand eight hundred and fifty-one, be, and the same are hereby reversed; and the Court, now here, proceeding to render such judgment in the premises as by the Court below ought to have been rendered, it is further adjudged, that the judgment of the Court below, in this cause complained of by the Appellants, rendered on the first of

April, one thousand eight hundred and fifty, be, and the same is hereby set aside and annulled, in what respects the rights and interest of Appellants, as creditors of Sawtell, and that no regard be had to said judgment, in so far as the rights and interest of Appellants, as creditor as aforesaid, are concerned therein; and it is further adjudged, that said report of distribution be amended, by striking out of the same, the collocation therein made of Respondent for the two several sums of ninety pounds, fourteen shillings and eight pence, and five hundred and twenty pounds fourteen shillings and ten pence, and by collocating Appellants for such sum and sums of money as they may be lawfully entitled to be collocated for by the said report of distribution; and it is further adjudged that such other and further proceedings be had in the court below, on the opposition of Respondent for rent hereinbefore mentioned, as to law and justice may appertain. (*3 D. T. B. C.*, p. 65.)

CROSS et COFFIN, pour les Appelants.

JUDAH et WURTELE, pour l'Intimé.

PRESCRIPTION.—DIMES.

COUR DE CIRCUIT, Terrebonne, 14 décembre 1849.

Présent : MONDELET, C., Juge.

BRUNET *vs.* DESJARDINS.

Jugé : Que la demande pour dîmes en Canada n'est pas sujette à la prescription annale (1).

L'action était portée pour trois années de dîmes dues par le Défendeur au Demandeur. Le Défendeur plaida la prescription annale.

MONDELET, C., juge: Cette question est intéressante sous

(1). Le quatre septembre mil six cent soixante-sept, Messieurs *De Tracy, Courcelles* et *Talon*, en leur qualité de gouverneurs et lieutenants généraux et intendants, firent un règlement avec Monsieur de *Laval*, premier évêque de ce pays, par lequel il fut arrêté, que les dîmes ne s'y paieraient à l'avenir que des grains seulement, à raison du vingt-sixième minot, en considération de ce que les habitants seraient tenus de l'engranger, battre, vanner et porter au presbytère. Ce règlement est resté au secrétariat de l'intendant *Talon*, et y a été perdu, cependant il a été exécuté de bonne foi de part et d'autre. L'édit du roi de France, Louis XIV, *concernant les dîmes et cures fixes*, daté à *Saint-Germain-en-Laye*, au mois de mai 1679, enregistré au Conseil Supérieur, le 23 octobre suivant, et rapporté dans le premier volume des *Édits, Ordonnances royaux, déclarations et arrêts du conseil d'Etat du Roi, concernant le Canada*, p. 231, ordonne que les dîmes seront prélevées suivant ce règlement du 4 septembre 1667. Par un arrêt du Conseil Supérieur, en date du 18 novembre 1705, il est fait défense à tous curés de ce pays, de faire aucune publi-

bien des rapports, et je dois exprimer les motifs qui me décident à donner gain de cause au Demandeur.

Par arrêt du Conseil Supérieur de Québec, du 18 novembre 1705, il est dit et déclaré que par le règlement du 4 septembre 1667, il fut arrêté que les dîmes ne se payeraient que des grains seulement, à raison du vingt-sixième minot, en considération de ce que les habitants seraient tenus de l'engranger, battre, vanner et porter au presbytère. Cet arrêt du 18 novembre 1705, confirme celui du 4 septembre 1667, et fait défense aux curés d'exiger et aux habitants de payer davantage.

Par l'Ordonnance de Blois, 1579, art. 49, il était défendu, en France, aux détenteurs d'héritages qui paieraient dîmes, de " mettre en gerbes, enlever ou emporter les fruits d iceux, sans avoir préalablement payé ou laissé le dit droit de dixme, à la raison, nombre et quantité qu'il a coutume d'être payé." (1)

On comprend que, vu cette Ordonnance qui devait être observée, sous peine de confiscation des grains enlevés, des chevaux et harnois, et de trente écus d'amende, au profit des décimateurs, il n'était que juste que le curé fût astreint à aller quérir sa dîme, et il convenait de ne pas exposer le contribuable aux pertes et dangers de laisser le grain sur le champ à attendre M. le curé.

Toutefois semble-t-il qu'en effet on regardât comme une maxime que " les arrérages de la dixme se prescrivent, et même le décimateur ne peut demander au possesseur que la dernière année." (2)

cation pour innover rien en la conduite qu'ils avaient tenue jusqu'alors dans le payement des dîmes et d'en exiger à plus haut prix et aux habitants d'en payer d'autres que celles arrêtées par le règlement du 4 septembre 1667, comme il s'était pratiqué depuis ce temps-là. Ce règlement est rapporté dans le Ve volume des *jugements et délibérations du Conseil Supérieur de Québec*, p. 184. Ainsi, par ce règlement du 4 septembre 1667, et par l'Edit de mai 1679, la dîme, en Canada, est portable et non quérable. La prescription annale, qui était généralement reçue en France était fondée principalement sur ce que la dîme y était quérable et non portable. Il en était autrement dans les cas où la dîme était abonnée et, par conséquent, portable. En France, l'usage seul gouvernait, mais l'usage en Canada a varié essentiellement de celui qui était suivi en France, et il n'a reconnu aucune semblable prescription. Par une ordonnance et jugement de l'intendant *Dupuis* du 21 août 1727 (2 Edits et Ordonnances p. 279 et 299), sur une plainte du curé de *Saint-Antoine* contre ses paroissiens, il a été ordonné aux habitants de la paroisse de payer les dîmes " tant pour l'année présente que pour ce qui peut en être dû du passé." En *Canada*, les arrérages des dîmes, peuvent être réclamés et recouvrés, et la prescription annale n'est ni fondée sur l'usage, ni sanctionnée par les lois du Canada du moins depuis le 18 novembre 1705. *Blanchet* vs. *Martin* dit *St Jean et al.*, C. B. C., Montreal, 1833, 2 *R. J. R. Q.*, p. 271.

(1) 6 Rép. Jurisp., Guyot, *verbo* dixmes, p. 15.

(2) 6 Rép. Jurisp., Guyot, *verbo* dixmes, p. 23.

Le premier arrêt qui paraît avoir été rendu au Parlement de Paris, est du 3 août 1708 ; il déclare non recevable en sa demande, pour les deux premières années un décimateur qui demandait le paiement de trois années d'arrérages de la dîme.

Au reste, cet arrêt isolé, rendu en 1708, trois ans après le règlement du Conseil Supérieur de 1705, ne serait d'aucun poids en Canada comme loi ou faisant jurisprudence.

Ainsi donc, la raison de la prescription annale. en France, n'existant pas ici, et le contribuable ayant ici obtenu réduction de sa dîme au 26e, à raison de ce qu'il est tenu de la porter au presbytère, il n'a aucun droit d'opposer cette prescription annale.

Le jugement est comme suit : Considérant que, par l'Arrêt du Conseil Supérieur de Québec du 18 novembre 1705, confirmant le règlement du 4 septembre 1667, le détenteur d'héritages assujétis au paiement de la dîme, ayant obtenu réduction de la dîme, attendu qu'entre autres raisons, il lui faut la porter au presbytère, et que, conséquemment, il n'y a pas lieu, en Canada, d'appliquer le principe de la prescription annale que le Défendeur invoque, laquelle avait pour cause et raison, en France, l'obligation onéreuse à laquelle était assujéti le détenteur d'héritages, de laisser sur le champ les fruits d'iceux, après les avoir mis en gerbes, sans pouvoir les enlever ou emporter, à moins qu'il n'y eût laissé pour le curé telle partie qui était pour la dîme ;

Considérant qu'il n'y a pas lieu d'opposer au curé, en Canada, la raison qui, en France, avait fait établir, à son encontre et en faveur du détenteur d'héritages, la prescription annale ;

Considérant que l'arrêt du Parlement de Paris, du 3 août 1708, trois ans après celui du Conseil Supérieur de Québec, du 18 novembre 1705, sus-mentionné, non plus qu'aucun autre arrêt isolé, ne peut être cité, comme établissant une jurisprudence, surtout quant au Canada ;

Considérant enfin, qu'à moins d'une loi positive ou d'une jurisprudence constante, il n'est pas au pouvoir des juges d'établir des prescriptions qui limitent la durée des actions :

Renvoie la dite exception et ordonne que les parties procèdent à l'enquête. (3 *D. T. B. C.*, p. 81.)

TURGEON, Procureur du Demandeur.

OUIMET, Procureur du Défendeur.

ENREGISTREMENT.

SUPERIOR COURT, Montreal, 21 september 1852.

Before DAY, VANFELSON and MONDELET, Justices.

DELESDERNIERS, Plaintiff, *vs.* KINGSLEY, Defendant, and CHARLEBOIS, Opposant, and Delesderniers, Contesting Rep. of Collocation.

Jugé: Que dans un acte enregistré, la mention d'un acte antérieur, non enregistré, n'est pas équipollente à un enregistrement du titre primitif, ni suffisant pour lui donner rang sur un créancier hypothécaire subséquent dont la créance est enregistrée. (1)

Charlebois claimed, by his opposition *à fin de conserver*, £184 7 6½ accrued under an *acte de constitution de rente* bearing date the 19th March, 1782, consented by Albert Kingsley, the father of Defendant, in favor of Pierre Castonguay, grandfather of Opposant, on a piece of land therein specially mortgaged, situate in the county of Vaudreuil. It was not alleged that this *acte* had ever been registered, but the opposition proceeded to set out that, on the 30th January, 1826, by another obligation, *en forme de titre nouvel*, Kingsley acknowledged to owe to the heirs of Castonguay, accepting by Dominique Charlebois, the father of the Opposant, the sum of 1183 *livres* 14 *sols*, described in said deed as "pour arrérages dus et échus le 16 juin de l'année alors dernière, sur la dite rente qu'il avait consentie au dit Pierre Castonguay, au capital de quatorze cent neuf livres treize sols, dit cours, dont acte reçu devant Galven, notaire, les jour et an y contenus," to secure the payment of which sum Kingsley mortgaged anew (*hypothèque de nouveau*) the land before described, seized and sold by the sheriff. That an authentic copy of this last *acte* was duly enregistered, on the 17th October, 1844, in the registry office of the county of Vaudreuil, that Opposant was now the sole creditor of the said rente, and concluded by invoking his right to receive the amount of his said claim by special privilege, as well the capital as the arrears recognized by the *acte* of the 30th January, 1826, and the subsequent arrears for twenty-six years.

A partial report of distribution having been made with the consent of parties, Plaintiff, an hypothecary creditor holding a mortgage of the land in question, under an obligation, dated 1st April, 1843, and registered on the 11th May, 1843, contested the Opposant's claim to be collocated as aforesaid, on the ground that the *acte de constitution de rente* of 19th March, 1782, had

(1) V. art. 2131 C. C.

never been registered, and that, consequently, he, Plaintiff, had a right to be preferred to Opposant on the monies returned by the sheriff for the whole amount of his claim, with the exception of the sum of £49 6s 5d, amount of the obligation of the 30th January 1826, which had been registered.

Opposant, by his answer, pretented that the registration of the deed of 1826 was equivalent to registration of the original deed of the 19th March, 1782, and that the effect of such registration was to preserve the rights and privileges of Opposant as well in said capital sum as on the interests then actually due or thereafter to become due.

DAY, Justice: The only question is as to the pretension of Opposant, that the registration of the deed of 1826 is equivalent to registration of the orignal deed, and gives him a right to claim the principal of the rent and the arrears subsequently accrued. The court are against this pretension. (1) Looking at the obligation of 1826, we are satisfied that it did not amount, even between the parties to it, to a deed of recognition. There is no place or date mentioned, and the original obligation is only referred to in the most general terms. There is nothing in it to show an intention to recognize a former deed; and, when it is considered that the object here is to bind a third party, we can have no doubt on the subject. But, if we leave general reasoning, and turn to the fourth clause of the Registry Act (2), we there find that registration is required by memorial or by deed at length, and it does not say that a mere reference in one deed to another deed is sufficient. The contestation therefore, must be maintained, and the opposition dismissed, except as regards the arrears of *rente* previous to 1826.

The judgment is as follows: Considering that it doth not appear that the *acte de constitution de rente* in said opposition, mentioned, was at the time registered, and that, by reason thereof and by law, the same is void and of no effect against any subsequent mortgagee or hypothecary creditor, and that Opposant hath no right to be paid, by preference, as an hypothecary creditor of Defendant, out of the monies for the distribution of which said report of collocation was made, any other sum than the sum of £49 6 5, amount for which the *acte* of obligation by him in the said cause filed was made and executed, for arrears of the rent therein specified, doth maintain the contestation by Plaintiff of said report of collocation. Re-

(1) L'enregistrement d'un transport d'une créance hypothécaire, ne constitue pas un enregistrement de cette créance, quoique l'acte de transport recite l'acte constitutif de la créance cédée. (*Girard* vs. *Paquet*, C. B. R., Québec, mai 1845, 2 *R. J. R. Q.*, p. 21.)

(2) Ord. 4 Vict., cap. xxx.

port of collocation ordered to be reformed accordingly. (3 *D. T. B. C.*, p. 84.)

DRUMMOND, LORANGER and DUNLOP, for Plaintiff.

LAFONTAINE and BERTHELOT, for Opposant.

TEMOIN.—RESPONSABILITE.

SUPERIOR COURT, Montreal, 7 janvier 1851.

Before DAY, SMITH and MONDELET, Justices.

ROCHON *vs.* FRASER.

Jugé: Qu'une personne ne peut être poursuivie pour dommages à raison de paroles par elle prononcées en rendant témoignage devant une Cour de Justice. (1)

Action for verbal slander, alleged to have been uttered in the Court of Quarter Sessions, at Montreal, in the course of evidence which Defendant was giving as a witness, the words complained of being to the effect that Plaintiff " était un mal-" honnête homme ; qu'il était capable de faire un faux serment ; " que lui, le Demandeur, avait juré faux deux fois, en sa pré-" sence, à lui, dit Défendeur."

Defendant pleaded, and it appeared that the words were spoken by him as a witness in the Quarter Sessions, in a cause in which Plaintiff was complainant, and that they had been elicited chiefly by the cross-examination of the witness by the Counsel of the Complainant.

(1) Le juge, même lorsqu'il excède ses pouvoirs et agit avec malice, n'est pas responsable en dommage. Le juré d'un coroner n'encourt aucune responsabilité, pour ce qu'il fait dans les limites de ses fonctions. C'est le droit anglais qu'on doit suivre, quant à sa responsabilité. Lorsqu'il agit dans les limites de ses fonctions, il est présumé le faire sans malice, et cette présomption n'admet aucune preuve au contraire. Aucun rapport d'un juré ne peut constituer un libelle. La malice en fait signifie un sentiment de malignité ou de mauvais vouloir. Ce n'est pas la signification de la malice en loi. Dans une action pour poursuite malicieuse, si la partie a agi avec cause probable, quoiqu'elle l'ait fait avec malice, elle n'est pas responsable. La signification ordinaire de la malice n'est pas la même en loi. La malice en droit est l'absence de justification légale. Celui qui fait tort à un autre, sans justification, est responsable. La question n'est pas de savoir quels sentiments l'ont animé, mais s'il a agi avec justification légale. Dans le cas d'un juré, la justification consiste dans le fait qu'il a agi comme juré. Le juré d'un coroner, qui, dans un rapport spécial, signé par plusieurs d'entre eux, fait des remarques, comportant qu'un témoin entendu devant eux s'est parjuré, n'est pas responsable vis-à-vis de ce témoin. Si un grand juré déclare qu'un acte d'accusation n'a pas été rapporté comme vrai, parce qu'un témoin s'est parjuré, ou, si un petit juré déclare qu'un verdict ne peut être rapporté pour la même raison, ni l'un ni l'autre n'encourt de responsabilité, pas plus que le juge, qui, en rendant son jugement en donne les motifs, le cas du juré et du juge est le même. Le juré est protégé, même lorsqu'il agit dans la minorité. La protection de la loi est pour chaque juré individuellement. (*Simard* vs. *Jenkins*, C. S. Montréal, 20 février 1854, *Day*, J., *Smith*, J., et *Mondelet*, J., 2 *R. J. R. Q.*, p. 354.)

DAY, Justice, in giving the judgment, said : There is no doubt that the exception pleaded is sufficient in law, and sufficiently proved to exempt Defendant from responsibility in damages. I am of opinion that a witness is never liable in damages for what he says in that capacity. The law protects him in this respect. If he swears falsely, he is liable to be indicted for perjury, but cannot be held liable in damages. (1)

MONDELET, Justice, concurring in the judgement : I dissent from the broad general principle laid down by the President of the court. I cannot go so far as to say that a witness may say anything he likes in the witness box, without punishment. Any man who, with malice, causes injury to his neighbour is responsible for the injury he causes. To maintain the contrary would be most dangerous. A witness should not take advantage of his position to defame. If he becomes "*accusateur malicieux*," he is responsible.

The following is the Judgment: "Considering that the words " in Plaintiff's declaration set forth and complained of, were, " in so far as the same are proved to have been spoken by " Defendant, so spoken in the course of evidence by him given " as a witness under examination in a Court of Justice, and " that, by law, he is not liable to be impleaded or sued in da- " mages by reason thereof, doth dismiss the said action. (3 *D. T. B. C.*, p. 87.)

OUIMET, A. & G., for Plaintiff.

BETHUNE & DUNKIN, for Defendant.

PROCEDURE.—ENQUETE.

SUPERIOR COURT, Montreal, 23 novembre 1852.

Before DAY & MONDELET, Justices.

WRIGLEY *vs.* TUCKER.

Jugé : Que lorsqu'une objection à l'enquête a été décidée et maintenue, et que la partie adverse a procédé à l'examen du témoin, et que la déposition a été close sans aucune réserve, la cour ne recevra pas une motion pour reviser la décision du juge donnée à l'enquête.

Motion to revise a ruling at *enquête.* Plaintiff's Attorney had put a question to a witness, which was objected to, and the objection maintained ; whereupon, he proceeded with the examination of the witness, whose deposition was afterwards closed without any reservation. He now moved to revise the order of the judge at *enquête.*

(1) 6 Dalloz, *Dict. General, Supplement*, verbo *Presse*, Nos. 5, 20 et 28.

PER CURIAM: The motion comes too late. The deposition being closed, the witness is out of the hands of the court. Plaintiff's counsel should have stopped the examination, or reserved his right.

The following is the Judgment: The court having heard the parties upon the motion of Plaintiff of 9th November instant, that the court do reverse the ruling in this cause made and rendered, by the judge presiding at *enquête* sittings, on the 6th November instant, maintaining the objection made and taken by and on behalf of Defendant, at and upon the examination in chief of Edward T. Taylor, a witness produced and examined in this cause on behalf of Plaintiff, to the question in the said motion set forth, examined the proceedings and deliberated; considering that the examination of said witness hath been completed, and his deposition finally closed, without the reservation of any right to the further examination of said witness, upon the question in said motion specified, doth reject said motion. (3 *D. T. B. C.*, p. 89.)

MACKAY and AUSTIN, for Plaintiff.

BETHUNE and DUNKIN, for Defendant.

REVENDICATION.—PREUVE.

SUPERIOR COURT, Montreal, 16 mars 1852.

Before DAY and SMITH, Justices.

THE BRITISH AMERICAN LAND COMPANY, *vs.* STIMPSON.

Sur demande en revendication contre un individu qui a coupé du bois sans autorisation, sur des terres incultes, les Demandeurs établissent suffisamment leur droit de propriété en prouvant des actes de possession en différents temps, sans produire de titres.

This was an action commenced in April, 1851, by a *saisie-revendication* of 68 trees of pine timber, converted into logs, alleged by Plaintiffs to be their property and unlawfully in the possession of Defendant.

The declaration alleged the possession of Plaintiffs at the time of the institution of the action and for upwards of thirty years before, of lots 1 and 10 in the 8th range of lots in the Township of Roxton, that Defendant had, within six months before the action commenced, without authority, cut and removed 68 trees from these lots: that, by the cutting and removal of the trees, Plaintiffs had suffered £25 cy., of damages, over and above the value of the trees.

Besides the ordinary conclusions of a declaration *en saisie-*

revendication, the declaration prayed that the Defendant might be condemned to pay £25, for damages, and. in default of his giving up the trees, that he might be condemned to pay £68, as the value of the trees. besides the damages.

Defendant,by a first plea, denied that Plaintiffs were possessed of the land, or that he cut the trees on these lots, and, further, averred that he purchased the trees in good faith from divers parties in Roxton, and had paid the full market price, and that the trees were worth £10 cy., and no more.

In evidence, it appeared that the land from which the trees had been taken was wild, and Plaintiffs han no title to file, and in fact no letters patent had ever issued from the Crown Lands Department, for these lots: but the proprietorship of Plaintiffs was made out, in the opinion of the court, by evidence of acts of possession during eighteen years, all tending to establish the presumption that they were proprietors, by a survey of the whole range having been made in 1844, by a surveyor, under the directions of Plaintiffs, by the tenants of Plaintiffs occupying different portions of the range under the survey, by Plaintiffs having been in the habit of advertising these lands for sale, by their paying road taxes, making a road along the range, selling timber, interfering with trespassers, and getting compensation from them. (1)

There was also in evidence a lease by Plaintiffs of a portion of lot No. 1 to a farmer, but not that portion on which the trespass had been committed. The proprietorship of lot No. 10 was further shewn by a lease from Plaintiffs to a party whom in fact Defendant had employed to supply him with a portion of the timber.

The court considered that Plaintiffs had sufficiently alleged and proved possession. They also held Defendant to be in had faith, although he had bought the logs from third parties as was proved, and condemned him to deliver up the logs, and further to pay £10, for damages done the land, and in default of his giving up the logs, to pay £27 3 9 as their value, beside £10 for damages. (3 *D. T. B. C.*, p. 90.)

TORRANCE, F. W., for Plaintiffs.

DRUMMOND and LORANGER, for Defendant.

(1) As to what are *actes* of possession, *Vide* Merlin, *Rep.* verbo *Complainte* p. 290.

LOI DES LICENCES.—PENALITE.—CONVICTION.

SUPERIOR COURT, Montréal, 2 décembre 1852.

Before DAY, SMITH and MONDELET, Justices.

Ex parte WOODHOUSE, and ex parte Hogue, Petitioners for writs of certiorari.

Jugé : Qu'une condamnation sous l'opération du statut des 14e et 15e Vict. cap. 100, pour avoir détaillé des liqueurs spiritueuses, lorsque l'accusation ne porte pas que cette vente a eu lieu sans licence, n'établit aucune offense, et ne peut être maintenue. (1)

Writs of *certiorari* had been issued in these cases to remove the convictions pronounced against Applicants, under the provisions of the 14th and 15th Vict., ch. 100. Several reasons were urged in support of the rule to quash the convictions, and amongst others, that, in the convictions, the offence of retailing spirituous liquors was not alleged to have been " without license."

DAY, Justice : These convictions do not disclose any offence. The omission of the words " without a license " is fatal, as these words are essential to constitute the retailing of spirituous liquors an offence under the Statute. The convictions are quashed. (3 *D. T. B. C.*, p. 93.)

STATUT PENAL.—PROCEDURE.—INFORMATION.

SUPERIOR COURT, Montréal, 2 décembre 1852.

Ex parte HOGUE and MONETTE *dit* BELLEHUMEUR.

Jugé: Que l'accusation d'une offense sous l'opération d'un statut pénal doit être rédigée d'une manière certaine et précise, et qu'une accusation de diverses offenses, sous une forme disjonctive est vicieuse.

Aussi : Que la confession du Défendeur, sur une accusation entachée de ces défectuosités, ne peut couvrir le défaut, et qu'aucune sentence ne peut être prononcée.

Aussi : Que la condamnation ne peut être que pour l'offense portée dans l'accusation, et non pour une autre, ou pour d'autres offenses énoncées avec la disjonctive.

(1) La section 2 du ch. 100 des Statuts du Canada de 1851, 14 et 15 Victoria, contenait la disposition suivante : " Aucune personne ne vendra, ni ne détaillera de l'eau-de-vie, rhum, whiskey ou autres liqueurs spiritueuses, vin, ale, bière, porter, cidre ou autres liqueurs vineuses ou fermentées, en quantités moindres que trois gallons à la fois, et aucune personne ne pourra tenir une auberge, hôtel, taverne, hôtel de tempérance ou autre maison ou lieu d'entretien public pour y recevoir les voyageurs ou autres personnes, sans avoir une licence ainsi qu'il est prescrit ci-après."

V. Art. 898 des Statuts Refondus de Québec.

Aussi : Qu'une condamnation portant qu'un Défendeur est coupable de plusieurs offenses y détaillées, et lui infligeant " pour la dite offense " une seule pénalité, est vicieuse.

In these cases, the informations and convictions were the same, for the offence of retailing liquors without a license. Defendants were severally charged in the information with having " le ou vers le 31 juillet dernier, et en différents temps, " avant et depuis, vendu, ou troqué, en détail, de l'eau-de-vie, " rhum, whiskey, *ou* autres liqueurs spiritueuses, *ou* autres " liqueurs vineuses et fermentées, *ou* aura fait vendre et dé- " tailler, dans la maison, dépendances par lui occupées, dans " la dite ville de St-Hyacinthe, en détail, contrairement aux " dispositions du statut fait et passé à cet égard, et sans " licence à cet effet."

On the day assigned in the informations, Defendants appeared before the Justice's Court, at St. Hyacinthe, and confessed judgment, and were, thereupon; condemned to pay the several sums of £12 10s, for penalty.

The convictions set forth that Defendant "est trouvé coupable, " sur sa propre confession, à raison de ce que le dit.... a, en " la ville de St-Hyacinthe, dans le dit district, le ou vers le " 31 juillet dernier, et en différents temps, avant et depuis, " vendu, troqué, en détail, de l'eau-de-vie, rhum, whiskey, et autres " liqueurs spiritueuses, vineuses et fermentées, et en a fait " vendre, en détail, dans la maison et dépendances par lui occu- " pées, dans la dite ville de St-Hyacinthe, sans avoir de licence " à cet effet."

Defendants moved, in the case of Hogue, to quash, and, in the case of Bellehumeur, for a writ of *certiorari*.

DAY, Justice : These cases have been put before the court with a great deal of ability, and the whole law bearing on *certiorari* has been prepared and sent up. The difficulty which struck us at first was the confession. On looking into the cases, however, we entertain no doubt the convictions must be quashed. It is hardly possible, indeed, to imagine cases where the informalities are greater. Taking up the case of Hogue, we find that, instead of charging one specific offence, the words of the statute have been copied into the information, and Defendant is charged with having sold by retail " brandy, rum, " whiskey, or other spirituous liquors, or other vinous or fer- " mented liquors, or shall have caused the same to be sold, &c." It would be very difficult to analyze such an information, or say how many offences are charged. If, under these circumstances, Defendant had confessed judgment on one point, the court might have felt inclined to maintain the conviction, but no, he has come up and confessed judgment generally, not that he was guilty of one of the offences charged, but that he was

guilty of all. The conviction, moreover, is as faulty as the information. It sets out that, on such a day, Defendant had been found guilty, on his own confession, of having retailed " brandy, rum, whiskey, and other spirituous, vinous and fermented liquors, and of having caused to be sold, &c., " putting in the conjunctive all the offences charged in the disjunctive in the information. Although a wide latitude might be allowed in legal pleadings, a conviction must state precisely what legal offence has been committed ; but this conviction goes on to say, that " for this offence," " *la dite contravention* " without shewing which offence, the Defendant is condemned to pay a penalty of £12 10s. The convictions must be quashed. The information is bad, and the conviction worse.

In the case of Hogue, the conviction was quashed, and in that of Bellehumeur the *writ* ordered to issue. (1) (3 *D. T. B. C.*, p. 94.)

CARTER, for Applicants.

LAFRAMBOISE, Attorney, for Prosecutor.

COURSOL and POMINVILLE, Counsel.

ENREGISTREMENT.—PREUVE.

COUR DU BANC DE LA REINE, EN APPEL, Montreal, 12 oct. 1852.

Présents : SIR JAMES STUART, Baronnet, Juge en Chef,

ROLLAND, PANET et AYLWIN, Juges.

NYE, Appelant, et COLVILE et al., Intimés.

Jugé : Que la copie, faite par un régistrateur, d'un acte de vente d'immeuble, enregistré dans son bureau, ne fait pas preuve de telle vente dans une action hypothécaire contre l'acquéreur de cet immeuble. (2)

L'action était portée, en la Cour Supérieure, à Montréal, par les Intimés, contre l'Appelant, en déclaration d'hypothèque, et la procédure faite *ex parte*, l'Appelant n'ayant pas

(1) Authorities cited in support of application ; 2 Chitty's Gen. Prac., pp. 153, 157, 164 ; 1 Paley, pp. 60 to 120 ; Deacon's Crim. Dig., *vbo* Conviction, p. 303, No. 8, 304, No. 11, 308, No. 16, 309, No. 23, 324, No. 15., *R.* vs. *King* ; 7 *Dow* and *Ry.*, p. 831, *R.* vs. *North* ; 6 *Dow* and *Ry.*, p. 144, *R.* vs. *Salomons* ; 1 Term Rep., p. 251, *R.* vs. *Hill* ; 2 Lt. Raymond, 1415.

(2) Une copie faite sur la copie enregistrée d'un acte de donation, ne fait pas preuve. (*Beaudet* vs. *Beaudet*, C. B. R., Québec, 1810, 2 *R. J. R. Q.*, p. 242.)

Le certificat du régistrateur, avec un endossement qui réfère à un acte de vente, ne fait pas preuve de propriété, en faveur de la personne mentionnée dans l'endossement. (*Provost* vs. *Faribault*, C. R. R., *Québec*, 1818, 2 *R. J. R. Q.*, p. 247.)

plaidé à l'action. Pour prouver la possession, à titre de propriétaire, de l'immeuble hypothéqué, les Intimés filèrent une copie, certifiée par le régistrateur, d'un document produit à son bureau et enregistré, et ce document était une copie notariée d'un acte de vente faite au Défendeur, l'Appelant, par le débiteur des Demandeurs. La Cour Inférieure donna jugement contre le Défendeur *ex parte*. L'Appelant se pourvut en appel, et, il alléguait, que pour justifier un jugement contre lui, deux choses étaient nécessaires : 1° l'existence d'une dette portant hypothèque sur l'immeuble en question ; 2° la possession de cet immeuble, par l'Appelant, à l'époque de l'assignation. Qu'en supposant que le premier point fût établi, le second ne l'était pas, et les Intimés n'avaient pas essayé de le prouver. Que la seule preuve au dossier résultait de deux documents, savoir : 1° une obligation, par un nommé Wilson aux Intimés ; 2° une vente par Wilson à Nye. L'Appelant soutenait qu'il fallait une preuve de sa possession matérielle au temps de l'action. Les Intimés répondirent qu'à défaut de dénégation spéciale de ces faits il devaient être censés admis, et que, d'ailleurs, la production du titre d'acquisition de l'Appelant faisait retomber sur ce dernier l'obligation d'alléguer et prouver qu'il avait cessé de posséder en vertu de ce titre. (1)

SIR JAMES STUART, J. en C. : Cette action était basée sur l'allégué que l'Appelant était en possession, à titre de propriétaire, de l'immeuble en question, et, pour le prouver, on produit une copie d'un acte de vente à Nye. La Cour Inférieure l'a considéré comme une présomption légale de la possession du Défendeur. Il n'y a aucune autre preuve que ce document. Cependant, on a trouvé que ce papier ne faisait aucune preuve légale, ce n'est que la copie d'une copie faite par le régistrateur sur son registre. Le fait essentiel se trouve donc dénué de preuve, et le jugement doit être renversé.

ROLLAND, J., *dissentiente* : Le jugement, que la majorité de cette cour infirme, était fondé sur une preuve qui a toujours été admise dans les tribunaux du Bas-Canada à ma connaissance. On a toujours jugé que la production du titre d'acquisition était une preuve suffisante de la possession du détenteur assigné en déclaration d'hypothèque. La possession qu'il faut établir est la possession civile et non la possession matérielle, et cette possession est suffisamment prouvée. Le défaut signalé ici n'a pas été invoqué par l'Appelant, et n'a été découvert que dans le délibéré. Il est bien vrai qu'une copie de copie ne peut faire preuve dans certains cas ; mais je pense qu'ici on devait l'admettre, car c'est la copie d'un acte enregistré par

(1) 3 Troplong, *Privil et Hyp* ; n° 784 bis ; 2 Pigeau, pp. 191, 594 ; Dict. de Dalloz, *rbo* hypothèque, p. 342, n° 3.

l'Appelant lui-même. Il aurait dû y répondre ; non, il s'est contenté de nier tous les allégués. D'après le statut de la 12 Vic. et la décision dans la cause de *Copps* et *Copps*, le Défendeur n'ayant pas nié spécialement cette possession, nous devons la considérer comme admise, et la preuve suivant moi, est suffisante.

Voici le jugement : Considering that there is no legal proof, that Thomas Wilson, ever sold the lot of land in question to Appellant, as alleged, and that there is no evidence to establish that Appellant was in possession of said lot of land, before and at the time of the institution of this action, and considering, therefore, that there is manifest error in the judgment of the court below, the judgment is reversed, and the action dismissed. (3 *D. T. B. C.*, p. 97.)

STUART, H., for Appellant.

ROSE and MONK, for Respondent.

ACTION HYPOTHECAIRE.—POSSESSION.—CHOSE JUGEE.

BANC DE LA REINE, EN APPEL, Montréal, 2 juillet 1855.

Présents : SIR L. H. LA FONTAINE, Baronnet, Juge en Chef, AYLWIN, DUVAL et CARON, Juges.

NYE, Appelant, *et* COLVILE et al., Intimés.

Jugé : Qu'une sentence déboutant une action hypothécaire, faute de preuve de la possession du Défendeur de l'immeuble hypothèqué, ne peut soutenir une exception de chose jugée, opposée à une nouvelle demande fondée sur la possession actuelle du Défendeur, la possession étant un fait qui se renouvelle de jour en jour.

En décembre 1852, après le jugement rendu dans la cause précédente, les Intimés poursuivirent de nouveau l'Appelant, mais pour le montant entier de l'obligation, le dernier terme de paiement étant échu, alléguant que Nye avait acquis l'immeuble en question, le 17 mars 1849, et qu'il en était alors, savoir, au temps de l'institution de la seconde action, le détenteur.

Nye plaida, d'abord, l'exception de chose jugée, suivant l'arrêt de la Cour du Banc de la Reine du 12 octobre 1852, intervenu sur les mêmes causes d'action ; puis une seconde exception de chose jugée, du moins, jusqu'à concurrence de £120 12 6, montant de la première demande.

Les Intimés répondirent aux exceptions, en établissant que la première demande avait été déboutée faute de preuve de la possession, par Nye, *au temps de l'institution* de cette première action, et que la demande n'était pas pour la même somme, et

que la première action n'avait été déboutée que par suite d'une erreur dans la procédure, et la production d'une copie non authentique de l'acte d'acquisition de Nye.

La preuve faite, la Cour Supérieure débouta ces exceptions, par jugement du 29 avril 1854, motivé comme suit : " Considering that Plaintiffs have established the material allegations of their declaration, and that Defendant hath failed to prove, in support of the exception of *chose jugée* by him pleaded, that the causes of action whereupon, and by reason whereof, Plaintiff now seeks to recover judgment *en déclaration d'hypothèque* against Defendant, are the same causes of action whereupon, and by reason whereof, Defendant was heretofore impleaded by the action in the said exception set forth, inasmuch as the last mentioned action was founded upon an alleged possession by Defendant, as *tiers détenteur* of the land and premises in said declaration mentioned, at the time the same was instituted, and which Plaintiffs failed to prove, whereas the present action is founded upon the possession of Defendant, as *tiers détenteur*, of the said land and premises at the time of the institution thereof ; dismissing the said exceptions, &c. "

Nye appela de ce jugement qui fut confirmé par la Cour du Banc de la Reine. (5 *D. T. B. C.*, p. 408.)

LORANGER et POMINVILLE, pour l'Appelant.

ROSE et MONK, pour les Intimés.

COMMUNAUTE DE BIENS.—INVENTAIRE.—MINEUR.—LOI DES PARTIES.

QUEEN'S BENCH, APPEAL SIDE, Montréal, février 1853.

Before SIR JAMES STUART, Bart., Chief Justice, ROLLAND, PANET and AYLWIN, Justices.

MCTAVISH, Appellant, and PYKE, & al., Respondents.

Jugé : 1. Que la veuve, étant saisie de tous les biens de la communauté, peut et doit procéder à l'inventaire, et qu'une action par elle à cette fin est absolument inutile.

2. Dans une demande en partage de la communauté par la veuve, les mineurs issus du mariage, doivent être représentés par un tuteur *ad hoc*, nommé spécialement pour répondre à la demande en partage.

Quelle loi doit régler les droits des conjoints dans le cas où le mari résidant à Abbitibbi, un poste dans les Territoires de la Compagnie de la Baie d'Hudson, vient dans le Bas-Canada où il se marie avec une personne y domiciliée, et retourne avec elle à Abbitibbi ?

Thomas Fraser, a native of Scotland, left that country, in 1803, and came to Montreal, where he entered into the service of the North-West Company, and was sent to Abbit-

ibbi, in the territories now belonging to the Hudson's Bay Company. In 1821, the North-West Company having merged in the Hudson's Bay Company, Fraser was transferred to, and went into the employ of the latter. From Abbitibbi, he was sent to Temiscaming, which is within the limits of Lower Canada, and was afterwards ordered back to Abbitibbi, where he resided until his death, in 1848. In the year 1836, he came to Montreal, where he was married to Appellant, and took her to Abbitibbi. There he remained with his wife, in the fort or building provided by the Company for its officer. In the years 1841 and 1843, he purchased two farms in Lower Canada, where he intended to settle, when he would leave the service of the Company.

On the 20th September, 1847, he made his will, at Montreal, before a notary and witnesses, whereby he willed all his property, as if no *communauté* had existed, leaving the Appellant his usufructuary legatee, and his minor children his universal proprietary legatees.

Appellant was appointed tutrix to her minor children, and Robertson, one of Respondents, sub-tutor. This latter refusing to consent to the taking of an inventory of the property, whereof Fraser was possessed at his death, as representing a *communauté* between Fraser and Appellant, she caused the Respondent Pyke to be appointed tutor *ad hoc* to said minor children, for "the purpose of protecting the rights, interests and claims of said minors, under the last will and testament of their late father," against the alleged claims of the tutrix in her petition, and to defend the suit and action to be brought by her, to establish her right as *commune en biens*, and, on his refusal to proceed to said inventory she instituted the action in which this appeal has taken place, alleging thereby that a *communauté de biens* existed between her and Fraser, according to the laws of Lower Canada, she prayed as "having been *commune en biens* with Thomas Fraser, that "she should be declared entitled to have and demand the "just half or moiety of all the property or effects, as well "moveable as immoveable, which composed said *communauté* "*de biens*, which existed between Plaintiff and Thomas "Fraser, to be by her enjoyed and disposed of as her own "property, to her of right belonging, and further, Plaintiff "prayed that, immediately, or within such delay as the court "should see fit to order, a legal and regular inventory of all "the goods, property and effects left by Thomas Fraser, and, "particularly, of those which composed said community "of property, should be made, and that said inventory should "be proceeded with, as well in the presence as in the absence "of Defendants, in their said capacity, they being first duly

" notified to assist at the execution of such inventory, to the " end that, upon said inventory, a division or *partage* might " be declared, ordered and decreed, and, further, that, so much " of the said last will and testament of Thomas Fraser, as " purports to will and bequeath the part or portion of " Plaintiff, as having been *commune en biens* in the said real " and personal property, be declared null and void and of no " effect," and, further, that a partition of the property which composed said community be made, in such manner that one just half or moiety thereof may be allotted and assigned to Plaintiff, as proprietor thereof, and that the other half be allotted to her, as well in her quality of usufructuary legatee of Thomas Fraser, as in her capacity of tutrix to said minor children, for her and their use and benefit, and praying also for a *licitation* of such part of the real property as could not be divided.

The only plea set up by Defendants avers that Thomas Fraser and Appellant were married in Lower Canada, during a temporary visit of Fraser to Lower Canada, she then being resident and domiciliated at Onslow, where the marriage was solemnized, without any contract or articles of agreement of marriage being entered into by them, for the regulation of their property, and said Appellant being then *majeure et usante de ses droits.* That, at the time of said marriage, Thomas Fraser was resident and domiciliated in a foreign country, to wit: the Hudson's Bay Company Territories, out of the jurisdiction, *régime*, and laws of Lower Canada, and where the laws of England prevail, and that no *communauté* de *biens*, could have taken place between Fraser and Appellant.

The Superior Court, composed of the Hon. Justices SMITH, VANFELSON and C. MONDELET (*dissentiente*), rendered the following judgment:

The court " Considering that Plaintiff hath failed to establish, by legal evidence, that, at the time of her marriage with Thomas Fraser, he Thomas Fraser was domiciliated within the limits of the heretofore Province of Lower Canada, or in any way within the jurisdiction of the courts of Lower Canada, and, considering that Defendants have established, by legal evidence, that Thomas Fraser, at the time of his marriage with said Flora McTavish, which said marriage took place and was celebrated within the limits of this Province of Lower Canada, was a resident and domiciliated at Abbitibbi, in the heretofore Province of Upper Canada, and without the limits of said Province of Lower Canada, and that Fraser, after his said marriage, immediately repaired to, with his wife, and continued to reside at his domicile, at Abbitibbi until the time of his death; and considering also that by law,

the law of the domicile of the parties, at the time of their marriage, must regulate the matrimonial rights of the husband and wife, and not the laws of the place where any real property, belonging to the husband, purchased after the marriage, may be situated, or on any declaration subsequently made by the husband but not acted upon; and considering that, by law, and for the reasons assigned, no community of property was created between Fraser and his wife, at the time of said marriage, although said marriage was celebrated within the limits of Lower Canada, doth dismiss the said action.

From this judgment an appeal was instituted by Flora McTavish, and the following grounds were urged for maintaining the action in the court below: 1° That Thomas Fraser had abandoned his domicile of origin; 2° That by fifteen years residence at Temiscaming, he had acquired a domicile of choice in Lower Canada. (1); 3° That, if not, he was without any domicile: his temporary and involuntary residence at the fort of the Hudson's Bay Company, without the intention of remaining there, having none of the legal requisites of domicile. (2); 4° That, if he had no domicile, then the law of the wife's domicile and the place of celebration of the marriage must govern. (3); 5° That, admitting all the foregoing propositions to be erroneous, yet as regards the real estate in Lower Canada, it is subject to the community, as a real law, and liable to be partitioned accordingly. (4)

On behalf of Respondents were cited a number of authorities upon these several points; 1° As to the law regulating the *communauté* and the domicile. (5); 2° The personal Status

(1) Dénizart, *vbo* Domicile, Sect., 2; D'Argentré, Art. 449.

(2) Locré, *Leg. Civ.*, Tome 3, L. 1, Tit. 3, part 2, p. 415; Voët, Book 5, Tit. 1, Sect. 97, and Book 38, n° 34; Pothier's Pandects, Lib. 30, Tit. 1, n° 18.

(3) Odier, *Contrat de mariage*, p. 60; Pothier, *Com.*, Art. préliminaire, n°s 15 & 16; Lebrun, Liv I, ch. II, n° 42.

(4) Burge, *Col. Law*, pp. 614, 5, 7, 8, 627; 3 Martin, *Condensed Rep.* of Louisiana, 670 to 677; Renusson, *Communauté*, part 1, ch. IV, n° 36; Lebrun, *Communauté*, liv. I, ch. II, n°s 36 to 38.

(5) Lebrun, *Com.*, liv. I, ch. II, par. 6, 7, 8; Arrêt of 1544 De Vigier; Arrêt of 1549 dit de St. Maur., in Papon's Vigier; Arrêt of 1572 dit de Villebon; Conférence des coutumes, Tit. 10, p. 551; Arrêt de 1595 de Sarchant Louet., Let. C., n° 16; Arrêt de 1640, de Vannelles, Fortier et Ricard en l'Art. 220; 1 Journal des Audiences, n° 3, ch. LXI; Lebrun, *Com.*, p. 11, par. 17, in fine; Brequet, *Droits de Justice*, ch. XXI, p. 200; Dumoulin, consult. 53; Boullenois, *Dissertations*, 5 Question, pp. 111, 112, 351, 356; 1 Boullenois, Traité de personnalité, pp. 737-8, 741, Obser. 29; Rép. de Jurisprud., *vbo* communauté de biens, p. 162, § 1; 1 Odier, *Contrat de mariage*, p. 55, n° 45; Fœlix, *Droit international*, 2 Edit., n° 22, p. 30, n° 23, p. 31, et seq.; n° 30, p. 40, n° 32, p. 44, n° 33, p. 53, n° 90, p. 127, see citations referred to in sup-

accompanies the individual wherever he goes. (1); 3° The personal Status applies to marriage, and the effects of marriage, *quant aux personnes, et, par suite, quant aux biens.* (2); 4° That the real property acquired during the marriage is within the rule of the Status as well as the *meubles* (3) 5° Change of domicile by the husband cannot alter the rights of the parties as established at the time of the marriage. (4); 6° By the domicile of the husband, is to be understood the place where he takes his wife, and settles himself immediately after the marriage; it is the domicile which the husband and wife have intented to choose. (5); 7° Place of residence " time of residence and place of death are all presumptive constituents of domicile. A continued residence at a place for ten years establishes domicile. (6); 8° If the domicile at Abbitibbi be rejected as the domicile of Thos. Fraser, then his domicile of origin revives. (7)

port of the rule in p. 127; Paul Voët. De Stat., Sect. 9, ch. II, n° 5; Jean Voët ad. ff, tit. de ritu. nupt., n° 85; Bacquet, *Droits de Justice*, ch. XXI, n°s 67 & seq.; Lebrun, *Communauté*, liv. I, ch. II, n° 38 & seq.; 1 Argou, p. 95; 2 Argou, p. 23; Pothier, *Communauté*, Art. prélim., n°s 1, 10 & 12; Rép. de Jurisp., *vbo* Conventions matrimoniales, § 2, 5; *vbo* Autorisation maritale, § 10, n° 3 & seq., *vbo* communauté, § 1, n° 3.

(1) Fœlix, p. 40, n° 30, p. 41; 1 Cochin, pp. 154, 345; 1 Boullenois, Tit. 1, ch. III, Obs. 9 et 10, p. 152, Obs. 12, p. 172; 4 Toullier, n° 102, p. 111, *in fine;* 1 Prud'homme, *Traité des personnes*, p. 82.

(2) Fœlix, n° 90, p. 137; Bacquet, *Droits de Justice*, ch. XXI, n° 67 et seq., p. 208, 209, 210 et n°s 73, 74, p. 211 et 212; Acte de Notoriété of 4th April, 1703; Boullenois, *Dissertations*, 5 Quest., p. 112, 113; Boullenois, *Dissertations*, 19 Quest., p. 251; 1 Boullenois, *Traité*, Tit. 2, ch. V, Obsers. 29, pp. 750, 751; 2 Boullenois, *Traité*, Ob. 35, pp. 260-1-2-4, 277; Lebrun, *Communauté*, liv. 1, ch. II, p. 15, par. 37-8-9-41-2-6-8-9-51-52; Boucher d'Argis, *Gains nuptiaux*, p. 139, n° 16, pp. 146, 245-6 et seq.; 1 Argou, p. 95; Basnage, pp. 492-3; Art. 329; Répert. de Jurisp., *vbo* Autorisation maritale, § 10, n°s 3, 5 et seq., p. 614-7; Ibid., *vbo* Convent. matrim., § 2, pp. 829, 830-2; Ibid., *vbo* communauté de biens, § 1, n° 3, pp. 138-9, 164-5; Pothier, *Communauté*, Art. prélim., n°s 1, 10 et 12; 1 Journal des Audiences, pp. 242-5, Vannelles' Case; 1 Despeisses, part 1, Tit. Marriage, § 5, n° 15; Auzanet, 155, Tit. 10, Art, 220; D'Argentré sur l'Art. 218, G. C., n°s 15 et 16; Nouv. Dénizart, *vbo* Domicile matrim., p. 686, n° 3, § 2, 1 § 3.

(3) Boucher d'Argis, p. 139; 1 Boullenois, *Traité*, p. 800, Obs. 29; Bacquet, ch. XXI, pp. 709 et seq; Boullenois, *Dissertations*, p. 112.

(4) Auzanet., p. 156; Bacquet, p. 212; 1 Boullenois, p. 509.

(5) Boucher d'Argis, p. 140; Lebrun, *Communauté*, liv. 1, ch. II, n° 42, p. 17, N°s 49, 51, p. 19; 2 Despeisses, p. 96, 502, N° 7; Pothier *Douaire*, N°s 13 & 16; 1 Odier, *Contrat de mariage*, p. 56, 8, 9, 60, 65; Nouv. Dénizart, *vbo* Domicile matrim, p. 685, par. 3, 4; Ancien Dénizart, *vbo* Domicile, p. 164; Bacquet, p. 558, N° 10; 2 Domat, p. 109, N°s 1, 2, 4, 5, 9; 1 Burge, p. 43.

(6) Lebrun, p. 19, n° 49; Lacombe, *vbo* domicile, p. 206, n°s 1 & 2; 2 Despeisses, p. 502, n° 7; D'Argentré, p. 449.

(7) 1 Burge., p. 34; Felix, p. 38, n° 28; 2 Ferrière, *G. Commentaire*, Art. 173, p. 1295; 2 Domat, p, 109, N°s 1 & 4.

The Court of Queen's Bench, gave the following judgment: "Considering that Appellant, from and since the death of her husband, has been and now is solely possessed of all and every the estates, real and personal, whereof her husband died seized and possessed, and that it was competent to her, at any time before the institution of this action, without any action, judgment or authority whatever, in this behalf, and, as being in possession of said estates, it was her duty to cause an inventory of said estates to be made in due course of law, and that this action, in so far as Appellant seeks, by it, a judgment of a court of law to compel the making of such an inventory, is wholly unnecessary and uncalled for; and considering also that the appointment of James Pyke to be tutor *ad hoc* is vague and uncertain, as respects the action which he is thereby authorized to defend, and confers no power whatever on him to make or join in the making of a partition, or a licitation as prayed for, and is wholly insufficient to make him a competent party to any such partition or licitation; it is adjudged that the judgment of the court below, for the reasons aforesaid, and not for the reasons, in the said judgment assigned, be and the same is hereby affirmed.

Hon. Justice ROLLAND, *dissentiente*: I cannot concur in this decision, as I conceive the action rightly brought, on the refusal of the *subrogé tuteur* (one of the Defendants) to join in the inventory. The only course, in such a case, was to appoint a tutor to the minors regularly and specifically named to defend the action, the object of which was to have the question of the existence of a *communauté* set at rest; a proper issue has been joined on the merits, and the court, in my opinion, ought to pronounce on the rights of the parties, instead of avoiding to do so, which I regret, having taken a different view of the case from my honorable *confrères*, as under no better circumstances, that I can perceive, could the question *en litige* be determined; nor can I see how the inventory could be made without a *légitime contradicteur*. The sub-tutor refusing to act and having probably been advised to do so. (3 *D. T. B. C.*, p. 101.)

ROSE and MONK, for Appellants.

BADGLEY and ABBOTT, for Respondent.

AVOCAT.—RESPONSABILITE.—TEMOIN.

COUR DE CIRCUIT, Québec, 28 février 1853.

Présent : POWER, Juge, C. C.

LAROCHE *vs.* HOLT et al.

Jugé : Qu'un procureur *ad lites* n'est pas responsable des salaires des témoins qu'il a fait assigner à la requête de son client.

Le Demandeur alléguait que les Défendeurs, agissant comme avocats et procureurs dans une cause, l'avait fait assigner comme témoin, au moyen d'un *subpœna* certifié par eux, et l'avaient interrogé comme tel de la part de leur client, et qu'en conséquence ils étaient responsables envers lui de ses frais de voyage et autres : pourquoi il concluait à une condamnation personnelle contre eux. Il fondait sa prétention sur ce qu'un procureur, qui a fait assigner des témoins à la requête de sa partie, doit être tenu en son nom payer les salaires de ces témoins, parcequ'il a dû, avant de les assigner, se faire donner, par son client, les fonds nécessaires pour cet objet.

Les Défendeurs opposèrent une défense en droit, par laquelle ils prétendaient que, comme procureurs *ad lites*, ils n'étaient pas personnellement responsables.

La cour maintint la défense en droit, et débouta l'action. (*3 D. T. B. C.*, p. 109.)

LELIÈVRE et ANGERS, Procureurs du Demandeur.

HOLT et IRVINE, Procureurs du Défendeur.

CERTIORARI.—COMPETENCE.

SUPERIOR COURT, Montreal, 16 novembre 1852.

Before DAY and MONDELET, Justices.

Ex parte CUMMING, for certiorari.

Jugé : Que la Cour Supérieure, siégeant à Montréal, n'a pas juridiction, et ne peut accorder un writ de *certiorari*, pour prendre connaissance d'une sentence prononcée par un juge de paix dans le district des Trois-Rivières.

The conviction which it was sought to quash had taken place before a Justice of the Peace, in the District of Three-Rivers. Both the magistrate and Defendant resided in the district of Montreal, and the writ of summons bore date at Upton, in the district of Montreal, but cited Defendant to

appear in the district of Three-Rivers, where the conviction itself took place.

On a motion for a writ of *certiorari*, the court held that it had no jurisdiction. The record on its face showed that the judgment complained of was rendered in the district of Three-Rivers, and this court had consequently no jurisdiction. Motion rejected. (*3 D. T. B. C.*, p. 110.)

TORRANCE and BANCROFT, for Petitioner.

CERTIORARI.

SUPERIOR COURT, Montreal, 16 décembre 1852.

Before DAY and MONDELET, Justices.

Ex parte GIBEAULT, for *certiorari*.

Jugé : Que dans le cas où un jugement de la Cour des Commissaires est vicieux quant à la forme, la Cour Supérieure ne peut accorder un writ de *certiorari*, à moins qu'il n'apparaisse qu'il y a excès de juridiction.

Motion to quash the judgment of a Commissioners' Court, condemning Defendant to pay the sum of fifteen shillings, subscription towards the support of a school. The judgment ordered " that Defendant do pay the sum subscribed for, and costs."

DAY, Justice : The judgment is evidently faulty, inasmuch as it is not made in favor of any particular party. The Applicant has taken the ground that this is a nullity, and that the same rule applies here which applies in convictions before Justices of the Peace. This is a mistake. The proceedings before Justices are *quasi* criminal proceedings, and we cannot extend the rules which govern them to courts of petty civil jurisdiction. If we did, we should soon have this a court of appeals for all the Commissioners' Courts in the district. All that can be said of the conviction is that it is bad in form, but there is nothing to show excess of jurisdiction. If there were, the court would interfere. Motion to quash rejected. (3 *D. T. B. C.*, p. 111.)

CANTWELL, for Applicant.

DEVLIN, for Prosecutor.

PRESCRIPTION.—BILLET PROMISSOIRE.

BANC DE LA REINE, EN APPEL, Montréal, 12 octobre 1852.

Présents : SIR JAMES STUART, Bart., Juge en Chef, ROLLAND, PANET et AYLWIN Juges.

HAYS, Appelant, et DAVID, Intimé.

Jugé: Que le faiseur d'un billet promisoire payable à demande peut opposer, en compensation au créancier et porteur de ce billet, un autre billet fait par ce créancier et porteur plus de cinq ans avant, mais endossé et transporté au débiteur du premier billet avant l'expiration du temps de la prescription du premier billet, et après la signature du second. (1)

2. Que dans ce cas la prescription ne peut être invoquée.

3. Que la compensation en question a lieu sans qu'il soit besoin au porteur de signifier l'endossement et transport à lui fait du billet qu'il oppose en compensation.

4. En l'absence de dénégation spéciale et de preuve contraire, la date de l'endossement d'un billet fait foi.

L'action était portée pour le recouvrement d'un billet promissoire fait par l'Appelant en faveur de l'Intimé, le 4 octobre 1849, pour £100 (payable à demande). L'Appelant opposa, en compensation partielle, un billet de £46 13 7, portant intérêt de sa date, fait par l'Intimé,en faveur de M. J. Hays, le 22 août 1845 et par ce dernier endossé en faveur de l'Intimé, le 1 novembre 1849, par un endossement en plein et paiement pour le surplus. L'Intimé rencontra ce plaidoyer par une réponse alléguant l'écoulement de plus de cinq ans entre l'échéance du billet offert en compensation et l'enfilure du plaidoyer, que le billet était conséquemment prescrit et présumé payé.

La Cour Supérieure, le 25 mai 1852, rendit jugement en faveur de l'Intimé, comme suit :

" Considering that Plaintiff hath proved the material allegations of his declaration, and that Defendant hath failed to establish, by evidence, that the promissory note in his exception set forth, and alleged to have been endorsed by Moses Judah Hays, in said exception mentioned, on the first day of November, 1841, was endorsed on the said last mentioned day, or on any other day before the expiration of five years from the time the same became due and payable ; and, considering that no suit at law hath been brought for the recovery of the said last mentioned promissory note, within five years from the time the same became due and payable, doth maintain the special answer of Plaintiff, and hold the same to be paid, and, dismissing the exception of compensation pleaded by Defen-

(1) V. art. 1188 C. C.

dant, doth adjudge and condemn Defendant to pay to Plaintiff the sum of fifty-seven pounds, ten shillings and eleven pence, current money of the Province of Canada, balance due to Plaintiff upon the promissory note, dated Montreal, fourth October, 1849, made by Defendant, payable on demand to Plaintiff, or his order, with interest thereon from the twenty-first day of March, 1850, until actual payment."

C'est ce jugement que l'Appelant chercha à faire infirmer, pour les raisons suivantes :

1° Parce qu'en l'absence de preuve contraire, l'endossement devait être considéré comme ayant été fait à la date qu'il porte ; 2° parce que, par le concours des deux dettes représentées par les deux billets, dans la personne de l'Appelant, au 1er novembre 1849, la compensation s'était opérée, et la prescription s'était arrêtée ; 3° parce qu'aucune prescription de la nature de celle invoquée par l'Intimé n'existait au temps de l'institution de la poursuite ou de l'enfilure du plaidoyer, et, conséquemment, la date de l'endossement n'était d'aucune conséquence. (1)

Sur la question de prescription, l'Appelant soutenait que, le statut de la 12 Vic. ch. XXII, ayant rappelé la 34 Geo. III, la prescription établie par ce dernier n'existait plus, (2) et que la prescription n'avait pas été acquise avant la 12 Vic. qui d'ailleurs n'avait pas d'effet rétroactif. (3)

L'Intimé, de son côté, prétendait que l'Appelant, en énonçant le transport à lui fait, le 1 novembre 1849, affirmait un fait qu'il était de son devoir de prouver, que les actes sous seing privé ne font pas foi de leur date à l'encontre des tiers, et que

(1) 6 Bingham's New Cases, p. 296, *Anderson* vs. *Weston* ; 7 Carrington and Payne, p. 408, *Parkin* vs. *Moon* ; 2 Pardessus, *Droit com.* (édit. 1831), p. 116, No. 333 ; 2 Savary, *Parfait Négociant*, pp. 263 and 267 ; 1 Nouguier, *Lettre de change*, p. 279, N° 2 ; 2 Bell's Commentaries, p. 231.

(2) Par la section 8, du ch. II, des statuts du Bas-Canada de 1793, 34 George III, il était décreté, que tout billet serait pris et considéré être payé et déchargé, si aucune poursuite ou action n'était instituée sur icelui dans cinq ans suivants, après le jour auquel tel billet serait devenu dû et payable ; pourvu toujours que chaque débiteur sur tel billet, s'il en était requis, ferait serment que tel billet, était *bonâ fide* déchargé et payé.

La section 31 du ch. XXII des statuts du Canada de 1849, 12 Victoria, contient la disposition suivante : "Toutes lettres de change à l'intérieur ou à l'étranger, et tous billets dus et payables dans le Bas Canada, à l'époque où cet acte deviendra en force, seront censés et considérés absolument payés et acquittés, à moins qu'une poursuite ou action ne soit intentée sur iceux dans les cinq années qui suivront le jour auquel les dites lettres de change ou billets seront et deviendront dus et payables, et toutes telles lettres de change et billets faits et non dus lorsque le dit acte prendra force de loi, ou qui seront faits après que le dit acte aura pris force de loi, seront censés et considérés absolument payés et acquittés si aucune action ou poursuite n'est intentée sur iceux dans les cinq années qui suivront le jour où les dites lettres de change ou billets deviendront dus et payables.

(3) Byles, on Bills (édition anglaise), pp. 124, 154 ; 4 Bingham's Reports, p. 297, *Haywood* vs. *Watson*.

l'on devait suivre les règles du droit français et non celles des lois d'Angleterre, que les autorités de l'Appelant n'étaient pas applicables. (1)

Il prétendit aussi que les droits acquis sous la 34 Geo. III, devaient être maintenus. (2) Et que la prescription commencée sous l'acte Geo. III, pouvait être complétée sous une nouvelle loi substituée à l'ancienne. (3)

La majorité de la cour donna gain de cause à l'Appelant.

SIR JAMES STUART, Bart, Juge en Chef : Il n'y a qu'un seul point en cette cause sur lequel cette cour soit d'opinion de renverser le jugement dont est appel. A l'action du Demandeur, le Défendeur a plaidé compensation, alléguant que partie de la somme demandée était compensée par un billet fait par le Demandeur et endossé en faveur du Défendeur, Appelant en cette cause. Il a été répondu à cette exception que ce billet était prescrit. La seule question qui s'élève est donc de savoir si la compensation a eu lieu de la date de l'endossement, le billet étant de 1845, et l'endossement fait en plein, avant l'expiration des cinq ans à compter de cette date,et la date de l'endossement, écrit sur le billet, est-elle preuve, *primâ facie*, que le billet avait été transporté ce jour-là ? S'il en est ainsi, la compensation a eu son effet dans les cinq ans, et il n'y a pas alors de prescription. On peut établir de la manière la plus irréfragable, par les lois anglaises et françaises, que la date est preuve, *primâ facie*, du fait, et comme on n'a fait aucune preuve du contraire, la cour doit maintenir la compensation et infirmer le jugement de la Cour Inférieure.

ROLLAND, Juge, *dissentiente* : La prescription n'a pas eu lieu, s'il y a eu compensation des deux dettes le 1er nov. 1849, jour de l'endossement du billet de l'Intimé au nommé Hays, que l'Appelant a produit et opposé en compensation pour la première fois en 1851 avec sa défense, et, sur cette défense, s'élèvent deux questions, l'une, question de fait, savoir si l'Appelant est vraiment devenu le porteur du billet le jour de la date de l'endossement, l'autre, question de droit, savoir, si n'en ayant pas donné connaissance à l'Intimé, il peut invoquer compensation de ce jour-là, de manière à éteindre, *pro tanto*, sa dette ? Il n'a été fait aucune preuve de la date, mais il est pré-

(1) Pothier, *Obligation*, n° 49 ; Merlin, *Questions de Droit*, vbo *tiers* ; Renusson, *Communauté*, éd. in folio, n° 10, p. 42 ; Byles, on Bills, p. 354 ; 6 Term Reports,p. 58, *Dickson* vs. *Evans* ; 2 Meeson and Welsby's Reports, p. 742.

(2) Dwarris, on Statutes, p. 675 ; Bacon's Ab., *vbo* Statute ; 7 Johnson's Rep., pp. 500, 512, *Dash* vs. *Van Kleek*.

(3) 6 Louisiana Reports, *Goddard's Heirs* vs. *Urquhart* ; 11 Louisiana Reports, *Moir* vs. *Repley*.

tendu que l'écrit fait foi de sa date, contre la règle que le *sous seing privé* n'a point de date authentique. La résolution de cette question pourrait empêcher de considérer l'exception de prescription, car, alors et dans le cas où l'on ne pourrait donner à l'endossement d'autre date que celle du jour où il y a eu production en cour, la prescription du billet étant alors acquise, il ne pourrait être opposé en compensation, et le jugement devrait être confirmé. Il faut, je crois, reconnaître que, dans notre droit commercial, les billets de commerce et lettres de change sont censés, ainsi que les endossements, avoir la date qu'on leur a donnée,à moins de preuve au contraire. Il y a des décisions en Angleterre à ce sujet. L'on a cité aussi Nouguier, pour établir qu'on tenait la même doctrine en France, et je n'ai aucun doute qu'elle doit être suivie en Canada, pour la négociation des billets, qui sans cela ne pourrait avoir lieu. La preuve peut établir la fausseté de la date, si elle est alléguée, mais, sans cela elle est tenue pour exacte, s'il n'y a soupçon de fraude. L'auteur français nous donne, à la page 82, dans son traité des Lettres de Change, un article du Code Napoléon. " *Il veut*, dit-il, *que les actes sous seing privé ne fassent foi de leur date, à l'égard des Tiers, que du jour où ils ont acquis une date certaine* ; cette disposition ne saurait être suivie en *ce qui touche les effets de commerce ; ces actes rédigés dans des formes spéciales, placés dans une catégorie exceptionnelle, jouissent d'immunité grande et légitime, et portent en eux-mêmes la preuve de leur confection,* " V. P. 278 et 279. Voilà la doctrine reconnue en France, et, j'oserais dire en Canada, avant le Code Napoléon. C'est un principe. Faisons-en l'application. D'abord, la règle générale est contre l'Appelant, et c'est de droit commun. Il faudrait qu'il se trouvât dans l'exception, mais il ne s'y trouve pas, car ce n'est pas ici le cas d'un effet de commerce, il s'agit d'un billet consenti *par un avocat,* et payable à demande avec intérêt. Il est bien payable à ordre, mais tous billets à ordre ne sont pas billets de commerce. (1) L'on sait la différence qu'il y avait en 1845, lorsque le billet en question fut fait, pour l'endossement des billets signés par autres que des commerçants. Toujours, ce billet n'est point un effet de commerce ; ce qui se rapporte aux endossements de billets à ordre, dans le commerce, n'est point applicable ici ; cela appartient exclusivement au droit commercial dont c'est une règle admise, contre celle du droit commun, à l'égard des sous-seings privés en général. L'exception de paiement par con-

(1) Nouv. Dénizart, *vbo* billet de commerce. *L'on entend par billets de commerce ceux qui sont faits par un négociant ou un banquier, à raison de son commerce.*

pensation d'une dette qu'a plaidée l'Appelant, a pour base notre droit civil. (1)

C'est notre droit commun. Ce n'est pas dans le droit commercial que nous trouvons ce principe de jurisprudence. L'on pourrait même dire qu'il y est opposé, car jamais, je pense, l'on n'a eu l'idée que des billets à ordre, dont sont porteurs deux marchands, à l'insu l'un de l'autre, se compensent dans leurs portefeuilles, tant que ces billets peuvent passer d'une main à l'autre. Et pourtant c'est ici le cas entre les parties dont l'une, l'Appelant, avait dans son portefeuille un billet négociable de son créancier, fait dont il ne lui avait pas donné connaissance. Le droit commercial n'ayant aucune application ici, il faut, suivant moi, s'en tenir à la règle du droit commun, et je ne mentionne ceci que pour nullifier l'importance que l'on attache aux citations prises des décisions en Angleterre, à l'égard de la date présumée des endossements; car, il ne s'agit ici que du paiement d'une dette, et non de la négociation d'un billet, non plus que d'aucune transaction commerciale, et ce paiement, on veut l'établir par un principe de droit commun auquel seul il faut avoir recours, pour décider s'il y a eu compensation de dettes ou non. L'on peut donc conclure avec la Cour Inférieure qu'il n'y a pas de preuve du temps où l'Appelant est devenu porteur du billet qu'il oppose. Dès lors, son exception tombe. Mais la seconde exception est plus délicate; car, admettant que l'endossement a eu lieu, et que l'Appelant soit devenu porteur de ce billet négociable, le premier de novembre, avant la prescription acquise, il faudra juger si la compensation des deux dettes a eu lieu, aussi d'après le même droit commun, et cette règle générale que la compensation a lieu de plein droit entre des personnes qui sont débitrices l'une de l'autre. (2) C'est de ce principe qu'il s'agit de faire application. Lorsqu'on dit que la compensation se fait de plein droit, *ipso jure*, cela signifie qu'elle se fait par la seule vertu de la loi, sans qu'elle ait été prononcée par le juge, ni même opposée par aucune des parties. Voilà la règle. Mais, comment s'imaginer que le transport d'une créance, à l'insu du débiteur et dont on ne lui donne aucune connaissance peut éteindre sa dette? Aussi, est-ce ce qu'il s'agit de résoudre, et dans quel cas et de quelle date cela a lieu? Pothier s'explique à cet égard. Il parle de la plus-pétition, aux conséquences de laquelle est exposé le créancier qui poursuit pour plus qu'il ne lui est dû, et cela dans le cas où sa dette est en partie éteinte par la compensation. Mais peut-on

(1) *Compensatio est debiti et crediti inter se contributio S. 1 ff. de compens.*

(2) *Placuit id quod invicem debetur ipso jure compensari;* L. 21 ff de Compens.

reprocher la plus-pétition à celui qui ignore le fait qui pourrait donner lieu à la compensation? Sans doute que non. C'est pourquoi le Demandeur aura ses frais, et cela, parce que sa dette n'a été éteinte que du jour qu'on lui a donné connaissance de l'existence de la créance qu'on lui oppose. C'est un principe, en fait de transport de créances, que le cessionnaire ne devient créancier que du jour de la signification, et si la cession de la dette, dans le cas actuel, eût eu lieu par un acte devant notaires, l'on n'eût pas pu prétendre qu'il y avait eu compensation du jour de la date authentique de ce transport. Pourquoi plus de faveur au porteur d'un billet par un endossement avec ou sans date? Mais il y a bien des raisons à donner au contraire, puisque ce porteur peut ne pas vouloir compenser, et encore négocier le billet. Il est non seulement inconnu, mais il a des raisons pour ne pas se faire connaître; celle, entre autres, que le faiseur de ce billet, s'il savait qu'il en est porteur, pourrait lui opposer paiement par compensation, ce qui ne ferait pas son affaire. L'on sait que la compensation est donnée par la loi comme un avantage; il est *in facultate* de l'opposer, c'est-à-dire, de l'invoquer. Il y a bien des cas où il n'est pas de notre intérêt de le faire; par exemple, quand on se propose d'acquitter sa propre dette par l'intervention d'un autre qu'on a chargé de la payer. Je mentionne un cas, il peut y en avoir mille, et alors, qui peut dire que la compensation se fera à notre avantage, malgré nous? Cela ne peut pas être. La règle générale de droit doit donc avoir son application équitable, suivant les cas qui peuvent y donner lieu. La doctrine est fondée sur une subtilité, une fiction. Il faut constamment subtiliser pour en faire l'application. Pour peu qu'il y ait préjudice, dit Pothier, la fiction ne doit pas avoir lieu. "*Beneficium legis non debet esse captiosum.*" En parlant de la plus-pétition, il observe que lorsqu'on ne porte pas à l'avoir du débiteur ce qu'on connaît lui devoir *nécessairement*, il suppose un cas où le créancier peut le faire, et non un cas où il ne le peut pas, parce qu'il ignore que son débiteur soit aussi son créancier, comme dans le cas où celui-ci est porteur d'un billet négociable, qu'il sera tenu de payer à celui qui le lui présentera. Je continue la citation de Pothier. (1) Il parle des compensations *qui n'ont lieu que du jour qu'elles sont opposées.* (Il y a donc de tels cas.) Il dit que, dans ces cas, la dette que l'on oppose, et qui ne porte pas intérêt, contre une dette portant intérêt, n'arrête les intérêts de celle-ci que du jour qu'on a opposé la compensation; et la raison en est toute simple; c'est parce que ce n'est que de ce jour qu'il y a eu compensation par l'extinction de la première dette; car,

(1) *Traité des Obligations*, N° 636.

si la compensation eût eu l'effet d'éteindre celle-ci, d'un jour antérieur à celui où le débiteur s'est fait connaître, la dette ainsi éteinte ne pouvait plus porter intérêt. L'auteur cite d'autres cas qui expliquent la règle générale de cette compensation appelée emphatiquement *de plein droit*. Il en est de ce principe comme d'autres; on l'applique par ses conséquences. Dénizart dit: "*Au moment que le créancier est devenu débiteur de son débiteur il ne peut transférer à un tiers sa créance, quand même il n'y aurait eu aucune demande de compensation, parce que cette créance est déjà éteinte, pareil transport est nul.*" (1) Voilà l'effet de la compensation quand elle a lieu. L'Appelant peut-il prétendre qu'après le 1er novembre 1849, où il dit que le billet, dont il est ce jour-là devenu porteur, a éteint la créance du Demandeur *pro tanto*, ce qui n'a pu avoir lieu que par l'extinction de sa propre créance, il n'a pu passer par endossement, le billet dont il était porteur, parce que son endossement eût été nul, comme dit M. Le Camus? De ce que cette prétention serait sans fondement, l'on doit conclure que le pouvant transporter et avec effet, c'est que la compensation n'avait pas eu lieu. En effet, la compensation, en pareil cas, me paraît une absurdité. Le porteur, par endossement, d'un billet n'est qu'un cèssionnaire qui doit se faire connaître pour réclamer l'avantage d'une compensation établie par la loi pour son avantage; mais cette loi, il peut en profiter ou non, suivant qu'il le veut. L'idée d'une compensation dont il peut demeurer libre de réclamer l'avantage, et à laquelle, quand il s'y détermine, il peut donner l'effet *nunc pro tunc*, comme d'une date où il n'avait pas l'intention d'en profiter, me paraît contre tous les principes de justice.

Puisque l'Appelant ne s'est pas fait connaître comme créancier de l'Intimée, avant le jour de sa défense à l'action, il a, ce jour-là, offert en compensation une dette éteinte par la prescription, et il était trop tard.

The court, considering that it is proved and established, by the evidence in this cause, that the promissory note, for forty-six pounds, thirteen shillings and nine pence, with interest, set up by Appellant in compensation against the demand of Respondent was, before any prescription of said note was incurred, indorsed by the payee to Appellant, and that the date of said indorsement, subjoined thereto, as it appears on said note namely, the first day of November, 1849, is to be deemed evidence that said indorsement was made at that time, there being no evidence to the contrary; and, considering that, by said indorsement, compensation of the debt sued for

(1) 2 *Nouveau Dénizart*, verbo *compensation*, p. 6.

by Respondent for the amount of fifty-eight pounds six shillings and eleven pence took place, by mere operation of *law*, whereby said debt, sued for, became and was extinguished to said amount; and considering that the residue of said debt sued for was, before the bringing of Respondent's action in the court below, paid and satisfied to Respondent; and, considering, therefore, that there is error in the rendering of the judgment of the court below; it is adjudged, that the judgment appealed from, namely, the judgment rendered on the twenty-fifth day of May, 1852, and the same is hereby reversed, annulled, and made void. And proceeding to render such judgment in the premises as by the court below ought to to have been rendered, it is adjudged that the pleading of Respondent, styled special answer, whereby prescription was pleaded in the court below, be, and the same is hereby overruled and dismissed, and that the action of Respondent in the court below, be, and the same is hereby dismissed. Honorable Mr. JUSTICE ROLLAND, *dissentiente*. (3 *D. T. B. C.*, p. 112.)

BADGLEY & ABBOTT, pour l'Appelant.

MACKAY & AUSTIN, pour l'Intimé.

ERECTION CIVILE DES PAROISSES.—CERTIORARI.

COUR SUPÉRIEURE, Québec, 15 mars 1853.

Présents: BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

Ex parte LECOURS, Requérant pour writ de certiorari.

Jugé: Que les pouvoirs exercés par les commissaires nommés en vertu de la 2 Vict., ch. XXIX, relativement à l'érection de paroisses, ne sont point des pouvoirs judiciaires, sujets à la revision de la Cour Supérieure au moyen d'un writ de *certiorari*.

La cour incline à croire que la majorité des intéressés dont il est question dans cette ordonnance doit s'entendre des habitants de la nouvelle paroisse ou division. (1)

Un certain nombre d'habitants, francs-tenanciers de la paroisse de St-Joseph de la Pointe Lévy, s'étaient adressés à l'archevêque, pour demander le démembrement d'une partie de cette paroisse, et la formation d'une nouvelle paroisse. Cette demande fut opposée devant l'archevêque; ceux qui demandaient le démembrement étaient la majorité des francs-tenanciers du territoire à démembrer, tandis que les Opposants, qui en étaient la minorité, comptaient néanmoins la majorité de tous les habitants de la paroisse de la Pointe Lévy, pris indis-

(1) V. les art. 3371 et 3373 S. R. Q.

tinctement dans toute son étendue. L'autorité ecclésiastique, aux termes de la 2 Vict. ch. XXIX, s. 2, ne pouvait procéder que sur la requête de la majorité des intéressés : or, la question à décider était de savoir si l'on devait entendre par majorité, celle des habitants de toute la paroisse, ou seulement celle des habitants, de la paroisse projetée. (1) L'archevêque adopta cette dernière interprétation, par son décret canonique d'érection de la nouvelle paroisse, de Notre-Dame de la Victoire, en date du 13 novembre 1851 :

Les Opposants tentèrent de soumettre cette décision de l'archevêque de Québec à la revision de la Cour Supérieure,

(1) Extrait de la 2nd Vict. ch. XXIX: " II. Toutes les fois qu'il s'agira d'ériger une nouvelle paroisse, de démembrer et subdiviser quelque paroisse, ou d'unir deux ou plusieurs paroisses, ou de changer et modifier les limites, bornes et démarcations de paroisses déjà établies et érigées suivant la loi ; ou lorsque, dans aucune paroisse ou mission, il sera question de construire et ériger une église ou chapelle paroissiale ou succursale, sacristie et autres dépendances de la dite église ou chapelle, un presbytère et ses dépendances, ou un cimetière, ou de changer ou réparer ces édifices ; dans tous ces cas, sur la requête d'une majorité des habitants francs-tenanciers, intéressés à toute formation, subdivision, démembrement ou réunion de paroisses, changement ou modification de limites, bornes et démarcations de paroisses, comme il est dit ci-dessus, ou intéressés dans la construction et érection, ou dans tous changements ou réparations de toute église, presbytère et cimetière comme il est dit ci-dessus. la dite requête présentée à l'évêque catholique du diocèse de Québec ou de Montréal respectivement, où telle érection, démembrement, subdivision ou union de paroisses devra avoir lieu, ou dans lequel tels église, sacristie, presbytère ou cimetière et dépendances devront être érigés ou réparés ; ou, en cas d'absence de l'évêque ou de vacance du siège épiscopal, la dite requête présentée à l'administrateur du dit diocèse ; il sera procédé par les dites autorités ecclésiastiques, ou par telle personne ou telles personnes qu'elles pourront nommer et autoriser aux fins ci-dessus, selon les lois ecclésiastiques et l'usage du dit diocèse, jusqu'au décret définitif d'érection canonique de toute paroisse, division, subdivision, ou réunion de paroisses, ou jusqu'au mandement ou décret par lequel il sera statué définitivement sur le site et sur la construction d'une nouvelle église ou chapelle paroissiale ou succursale, ou sacristie, ou d'un presbytère ou d'un cimetière, et sur leurs dimensions principales, ou sur leur changement, ou sur les réparations à faire aux dits édifices, ainsi que le cas pourra être."

IV. Lorsqu'il aura été ainsi rendu, suivant les lois et les formes canoniques suivies et en usage dans le dit diocèse, un décret d'érection d'une nouvelle paroisse ou subdivision, démembrement ou réunion de paroisses, ou à l'égard de tous changements ou modifications de limites, bornes et démarcations de paroisses déjà érigées et établies suivant la loi, alors il sera loisible à la majorité des habitants francs-tenanciers dans les dites paroisses, ou divisions de paroisses intéressés dans les dites érections, démarcations, bornes et limites fixées par le dit décret canonique, de s'adresser aux dits commissaires pour demander la reconnaissance civile du dit décret canonique ; et alors les dits commissaires pourront procéder à constater l'étendue des limites et les bornes et démarcations de toute paroisse, subdivision, demembrement et réunion de paroisses et pourront généralement s'enquérir de tout ce qui aura été fait et ordonné à ce sujet par les autorités ecclésiastiques seules, ou de tous changements et modifications faits par les dites autorités aux limites, bornes et démarcations des paroisses ou subdivisions de paroisses déjà établies et érigées suivant la loi ; dont et du tout les dits commissaires feront un rapport au Gouverneur, Lieutenant-Gouverneur ou personne ayant l'administration du Gouvernement pour le temps d'alors, dans lequel rapport ils désigneront les bornes, limites et démarcations de telles paroisses ou subdivision de paroisses, ou les change-

en demandant un *writ de certiorari*, pour faire transmettre devant cette cour les procédures ecclésiastiques; mais cette demande fut rejetée, sur le principe que," un décret canonique, érigeant une paroisse, n'est pas une procédure civile qui puisse être revisée par la Cour Supérieure au moyen d'un *writ de certiorari* : que ce n'est qu'une procédure purement ecclésiastique, hors de la juridiction de cette cour, tant qu'il n'y a point de procédures tendant à lui donner des effets civils." (1)

Le décret canonique fut ensuite porté devant les commissaires pour l'érection des paroisses, afin de lui donner les effets civils, suivant le mode indiqué à la section 4, de la 2e V. ch. XXXIX, citée dans les notes. Là il fut encore opposé, sans plus de succès, sur le même principe, et les commissaires firent rapport au gouverneur recommandant l'érection de la nouvelle paroisse, et, en effet, elle fut érigée par proclamation, au mois d'octobre 1852. C'est sous ces circonstances, que le requérant Lecours s'adressa à la cour, pour obtenir la revision des procédures civiles qui avaient ratifié le décret canonique, au moyen d'un *writ de certiorari*. Il alléguait entre autres moyens, que : " La majorité des habitants francs-tenanciers de " la paroisse de St-Joseph de la Pointe Lévy, qui avaient un " intérêt dans la subdivision et dans le démembrement de la " paroisse, et dans la formation et érection de la nouvelle " paroisse projetée, était au delà de soixante-et-sept ; que " ceux qui demandaient la division et le démembrement ne " comptaient que trois cent cinquante-six, y compris ceux qui " n'étaient pas francs-tenanciers, tandis que le nombre des " signataires de la contre-requête, habitants et francs-tenanciers " de la paroisse de St-Joseph de la Pointe Lévy, ayant intérêt " dans le démembrememt et contre la formation et érection de " la nouvelle paroisse, était au delà de quatre cent vingt-trois ; " que lui Lecours, ainsi que tous les Opposants en la contre-" requête, étaient intéressés dans le démembrement, puisqu'icelle " nouvelle paroisse était formée de partie de la paroisse St-" Joseph de la Pointe Lévy, dans laquelle paroisse lui le dit " opposant et les signataires de la contre-requête sont habitants

ments et modifications à faire aux paroisses déjà établies et érigées suivant la loi, déclarant de plus les limites, bornes et démarcations qu'ils croiront être le plus convenable d'assigner pour la commodité des habitants : Pourvu toujours, que dans le cas où il deviendrait nécessaire de faire quelques changements ou modifications à ce qui aurait été réglé et ordonné par le décret canonique, il sera du devoir des dits commissaires de consulter les autorités ecclésiastiques ci-dessus mentionnées, ou telle personne qui sera cu pourra être nommée par elle pour cette fin, et d'obtenir à ce sujet leur opinion, que les dits commissaires mentionneront aussi dans leur rapport, ainsi que toutes remontrances et représentations qu'aucun nombre d'habitants auront cru nécessaire de leur présenter à l'appui de leurs demandes et réclamations. "

(1) *Ex parte Guay*, requérant pour *certiorari*, *suprà*, p. 191.

" francs-tenanciers, et qu'au moyen du démembrement, les " charges des francs-tenanciers de ceux qui demeurent dans la " paroisse St-Joseph de la Pointe Lévy et de ceux qui forme- " ront la nouvelle paroisse se trouvent augmentées, l'importance " de la paroisse diminuée, et que le placement de la nouvelle " église ne convient pas, et n'est pas fait d'une manière juste " à la majorité des francs-tenanciers de la paroisse de St-Joseph " de la Pointe Lévy ; qu'un certain nombre d'habitants,francs- " tenanciers de la nouvelle paroisse Notre-Dame de la Victoire, " se sont ensuite adressés par requête à messieurs les commis- " saires pour l'érection civile des paroisses et pour la construc- " tion et réparation des églises, presbytères et cimetières, dans " et pour le district de Québec, demandant la reconnaissance " civile et la confirmation du décret canonique ; que les signa- " taires de la contre-requête se sont opposés à la demande, en " fesant valoir les moyens ci-haut mentionnés,et que, le dixième " jour de septembre dernier, les commissaires rejetèrent et dé- " boutèrent l'opposition des signataires de la contre-requête, et " ordonnèrent que le procès-verbal d'érection civile de la paroisse " Notre-Dame de la Victoire, soit immédiatement dressé pour " être signé par eux (dits commissaires) et soumis à Son Excel- " lence le Gouverneur-Général ; que tous les signataires dans " la contre-requête et opposants du démembrement, était alors " et sont encore francs-tenanciers dans la paroisse de St-Joseph " de la Pointe Lévy, et de la religion catholique romaine ; que " les commissaires ont excédé et outrepassé leur juridiction, " en procédant à l'érection civile de la paroisse, et en agissant " sur le décret canonique, tandis que, de fait, il n'existait aucun " décret canonique légal, rendu sur la demande de la majorité " des francs-tenanciers d'icelle paroisse de St-Joseph de la " Pointe Lévy, et lorsqu'il apparaissait que le décret canonique " avait été fait et dressé sur demande de la minorité des francs- " tenanciers de la paroisse ; qu'en conséquence les Opposants en " la contre-requête, se trouvent lésés par le décret canonique " et le jugement des commissaires, et que, pour cette raison, " lui Lecours demande un writ de *certiorari*, pour faire venir " devant la Cour Supérieure dans et pour le Bas-Canada, " siégeant à Québec, les procédés de Sa Grâce le dit Archevêque, " les requête et contre-requête ci-haut mentionnées, ainsi que " le jugement des commissaires rendu le dixième jour de " septembre dernier, et tous les ordres et jugements rendus " par les commissaires sur la requête, demandant la reconnais- " sance civile, et la confirmation du décret canonique, et tous " autres papiers concernant la dite affaire, tel que le tout a été " fait par les commissaires et a eu lieu devant eux et est de " record devant eux."

Les prétentions de Lecours étaient que la majorité dont il

était question dans l'ordonnance était celle des habitants de toute la paroisse, lesquels étaient tous plus ou moins intéressés dans la formation d'une nouvelle paroisse; que les termes de la loi étaient clairs sur ce sujet; que les pouvoirs exercés par les commissaires étaient des pouvoirs quasi-judiciaires, en autant qu'ils statuaient sur le fait même de la majorité, s'il y avait lieu au démembrement, qu'ils en fixaient les délimitations, &c. Les requérants favorables au démembrement soutenaient le contraire de ces propositions.

La cause présentait ces deux questions: 1° que doit-on entendre par majorité dans l'espèce citée? 2° les commissaires exerçent-ils des pouvoirs judiciaires, sujets à la revision des Cours Supérieures?

La cour a exprimé l'opinion : 1° que le mot *majorité* signifie la majorité des habitants de la nouvelle division :

Et elle a jugé : 2° que les pouvoirs exercés par les commissaires, quant à l'érection des paroisses, ne sont pas judiciaires.

Ceci ne doit point s'entendre des pouvoirs exercés par les mêmes commissaires quant à la construction des églises, qui n'exigent pas le concours ou la sanction de l'exécutif, et qui ont été souvent soumis à la revision des Cours Supérieures.

DUVAL, juge : The application, is made on behalf of Lecours, for a *writ* of *certiorari*, to remove into this court the proceedings of the commissioners for the erection of parishes, &c., relating to the erection of the new parish of Notre-Dame de la Victoire.

The writ of *certiorari* is given for the removal of *judicial*, not merely *ministerial* acts, and, therefore, neither a warrant of a justice, nor an order of court, not constituting a final decision, can be removed by this writ. Chitty, in his general practice, says : a *certiorari* is in the nature of a writ of error, removing a conviction into this court, where only objections and defects, appearing on the face of the conviction, or in some stage of the proceedings, can be discussed. Let us apply this to the case before us; Lecours complains that the proceedings have not been taken on the application of a majority of the inhabitants being freeholders. But, in this, he is in error ; the majority required by law is not a majority of all the inhabitants of the then existing parish, but a majority of those interested in the subdivision or dismemberment of the parish ; freeholders having an *adverse* interest are entitled, by the 2d. clause of the ordinance, to a notice, of at least ten days, of the day and place of proceeding on the part of the ecclesiastical authority, and by this enactment an opportunity is afforded to them of making known all the objections they have to the granting of the demand made. That the application was made by a majority, interested in the subdivision prayed for, is a

fact which has been proved against Lecours. It is clear that, on this ground, no *certiorari* could issue, admitting there was no other objection to the motion, for we cannot try a matter of fact ; the writ of *certiorari* gives this court none of the powers exercised by a court of appelate jurisdiction.

I now come to the question : can a *certiorari* be granted addressed to the commissioners named in virtue of the ordinance, 2 Vict., ch. XXIX, to remove the proceedings complained of in this case ?

To entitle the party to this writ, he must show that the commissioners have made an order constituting a final decision : on refering to the ordinance, we find that the commissioners have no power to make such an order ; they are ordered to make a report of their proceedings to the governor. In this report, they are to set forth the bounds and division lines of the parish, the alterations to be made in parishes already existing, and the bounds and division lines which they may think it would be for the convenience of the inhabitants to assign, they are further ordered, in case any change is to be made in the matters regulated by the canonical decree, to consult the ecclesiastical authorities, in order to obtain their opinion thereon, and this *opinion* they are to communicate in their report, with all remonstrances and representations which the inhabitants may have made to them. In one word, they are ordered to send to the governor a full report of all the proceedings had before them. Is this a final decision ? quite the reverse ; they submit to the governor their own opinion, the opinion of the ecclesiastical authorities, and the remontrances made by the inhabitants. Should the governor, after a careful examination of the proceedings, entertain an opinion opposed to that of the commissioners, he assuredly is not bound by their opinion, which is no more than a recommendation, an advice, which the legislature has sufficiently defined by the words " which they, the commissioners may *think.* "

Had the power, vested by the ordinance in the Governor General, been given to any tribunal subject to the controlling power of this court, would the present application have been made, certainly not, the motion would have been for a *certiorari* addressed to the Judge who had pronounced the order, constituting, in the words of Chitty, the *final* decision, and not to subordinate officers whose powers are limited to the making of a report which decides nothing.

I am, therefore, of opinion that the *certiorari* cannot be granted. I will further observe, that all the objections urged, will, on mature consideration, be found to be objections to the ordinance, and not to the construction we now put upon it.

MEREDITH, Justice ; The powers exercised by the com-

missioners, under the 4th Sect. of the Ordin, 2 Vict., ch. XXIX, with respect to the erection and dismemberment of parishes, are essentially different from those exercised by the same officers, under the 15th section of that ordinance, with respect to the confirming or rejecting of acts of assessment.

In the latter case, the commissioners are expressly empowered " to hear, judge and determine between the trustees and the parties interested."

The powers thus granted are clearly of a judicial nature, and, consequently, we find that *writs of certiorari* have, in many instances, issued for the purpose of bringing before the higher tribunal, proceedings of the commissioners under the 15th section of the ordinance.

But, under the 4th section, the commissioners are merely empowered "*to ascertain*" the limits, &c., of the parishes or subdivisions of parishes, "*to enquire into all things that may* " *have been done or ordered by the Ecclesiastical authorities*," and "*to make a report*" to the governor.

The powers thus vested in the commissioners are merely ancillary to those vested in the governor, and it is the proclamation of the governor, and not the report of the commissioners, that "avails as a legal erection or confirmation " for all civil purposes of the parish or parishes or subdi- " vision of parishes therein designated." For these reasons, I am of opinion that the proceedings, on the part of the commissioners in the present instance, are not of a judicial nature, and consequently that they are not liable to be brought before us by *certiorari*. (1) Rule discharged. (3 *D. T. B. C.*, p. 123.)

LELIÈVRE et ANGERS, pour Lecours.

GAUTHIER, LEMIEUX et DELAGRAVE, pour la Fabrique de Notre-Dame de la Victoire.

AUTORISATION MARITALE.—POURSUITE.

COUR SUPÉRIEURE, Québec, 8 septembre 1852.

Présents: BACQUET et DUVAL, Juges.

CARY, Demandeur, *vs.* RYLAND, Défendeur, *et* GORE, Opposante.

Jugé: Que la femme,séparée quant aux biens contractuellement,peut

(1) Corners, *Crown practice*, p. 66 ; 1 Chitty, *Gen. practice*, p. 375 ; 1 Deacon, Crim. law, p. 208 ; Hart Dig., 1 Vol., p. 208 ; Jacobs Law Dict., Vol. 1, p. 412, verbo *certiorari*.

ester en jugement sans l'assistance ni l'autorisation de son mari pour la conservation de ses biens mobiliers.

Mary Pitt Gore, femme séparée contractuellement, quant aux biens, d'avec son mari, avait fait une opposition à fin d'annuler, sans que son mari fût partie à la procédure. Le Demandeur plaida à cette opposition par une défense en droit, alléguant que l'Opposante ne pouvait procéder ainsi sans que son mari fût partie à la cause pour l'autoriser et l'assister, ou sans être autorisée en justice. *Per Curiam:* Femme séparée quant aux biens d'avec son mari, et qui a l'administration de ses biens mobiliers, peut, sans l'assistance de son mari, faire les procédures nécessaires pour leur conservation. (1) Défense en droit déboutée. (3 *D. T. B. C.*, p. 132.)

CANNON, pour le Demandeur.

HOLT et IRVINE, pour l'Opposante.

ENREGISTREMENT.—FRAUDE.

COUR SUPÉRIEURE, Québec, 7 mars 1853.

Présents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

ROSS, Demandeur, *vs.* DALY, Défendeur, et KILLALY, Opposant.

Jugé : Que la connaissance qu'a eue un créancier subséquent de l'existence d'une créance antérieure, non enregistrée, due par son débiteur, ne suffit pas pour le constituer en mauvaise foi, et le priver de son rang d'hypothèque, résultant de l'enregistrement de sa propre créance, s'il n'y a de sa part, fraude ni collusion. (2)

Le Demandeur, conjointement avec un autre, réclamait, par une opposition sur le produit des immeubles du Défendeur, par privilège de bailleur de fonds, le principal et les arrérages d'une rente constituée, créée sur les immeubles en question, en vertu d'un acte de vente du 5 avril 1830, enregistré le 15 novembre 1849. L'Opposant réclamait par simple droit d'hypothèque créé par acte du 23 septembre 1843, enregistré le 18 novembre 1846.

Le projet de distribution colloquait Killaly. Ross contesta ce rapport, sur le principe, que dans l'acte d'obligation de Killaly, il était mention de l'acte de vente de 1830, et du constitut ; et que, conséquemment, Killaly avait eu connaissance de la cré-

(1) Cout. de Paris., Art. 224 ; Pothier, *Traité de la puissance du mari*, n° 60 ; 1 Pigeau, p. 33 ; Enc. de Droit, *vbo* Autorisation.

(2) V. art. 2085 C. C.

ance de Ross, et n'était pas un possesseur d'hypothèque de bonne foi, qui pût obtenir une préférence sur un privilège antérieur non enregistré,aux termes de la 4e Vict., ch. XXX, s. 4, qui porte : " que tout droit privilégié et hypothécaire, qui n'aura " pas été enregistré, sera nul à l'égard de tout subséquent " possesseur, *bonâ fide*, de droits privilégiés ou hypothécaires " duement enregistrés."

La mention de l'acte de vente, d'où l'on prétendait faire dériver la connaissance de Killaly était en termes généraux.

Ross fesait une distinction entre les actes antérieurs et les actes postérieurs à l'ordonnance des enregistrements, entre la 1re et la 4e clauses. Car, relativement aux actes antérieurs, la première clause dit expressément que la connaissance ou notice d'aucun droit antérieur ne pourra vicier aucune créance postérieure.

Quant à l'effet de la connaissance ou de la notice nécessaire pour constituer l'acquéreur subséquent en mauvaise foi, Ross cita 1 *Pigeau*, p. 114. (1)

Killaly soutenait que quant à la connaissance d'un droit antérieur, suffisante pour constituer un créancier subséquent en mauvaise foi, la loi française différait de la loi anglaise; qu'en Angleterre, il est vrai que la mention d'un acte antérieur équivalait à une notice d'une créance antérieure, et suffisait pour constituer en mauvaise foi ; tandis que, dans notre droit, cette mention ne produisait aucun effet. Il maintenait d'ailleurs que la disposition expresse, qui se trouve dans la 1ère clause de l'ordonnance, et qui statue expressément que telle connaissance n'aura aucun effet, n'est pas seulement applicable aux actes antérieurs à l'ordonnance, mais est une disposition générale qui s'applique à tous les cas et qui domine tout le reste de l'ordonnance.

BOWEN, J. en C. : Nous avons jugé itérativement que le vendeur, dont le privilège est antérieur à la loi des bureaux d'enregistrement, 4 Vict. ch. XXX, perd son rang d'hypothèque, s'il n'a enregistré son titre de créance. Dans le cas actuel, Ross et autre, bailleurs de fonds, qui ont négligé d'enregistrer leur titre, se trouvent primés par Killaly, un créancier subséquent qui a enregistré le sien ; et, en conséquence, ils contestent la réclamation et collocation de ce créancier subséquent : 1° sur le principe qu'il y a eu fraude et dol de sa part ; et 2° sur ce

(1) Il a été jugé, sous les statuts du Bas-Canada, 10 et 11 Geo. IV, ch. VIII ; 1 Guil. IV, ch. III et 2 Guil. IV, ch. VII, que le défaut d'enregistrement d'un acte de vente ne le rendait pas nul vis-à-vis d'un acquéreur subséquent qui connaissait ce titre lorsqu'il a acheté, quoiqu'il eût fait enregistrer le sien. (*Smith*, Demandeur, *vs. Terrill*, Défendeur, et *Phillips*, Opposant, C. B. R. de *St-François*, septembre 1835, *Bowen, J.*, *Vallières, J.*, et *Fletcher, J.*, 2 *R.J. R. Q.* p. 220.

qu'il est un créancier de mauvaise foi, en raison de la connaissance qu'il a eue de l'existence de cette créance antérieure. Quant à la fraude, il n'y en a aucune preuve ; au contraire, il est indubitable que les deniers prêtés ont été bien et duement payés au débiteur. La connaissance, attribuée à Killaly, de l'existence du privilège de Ross et autre, procède de ce que la vente, faite par Ross à Daly, est mentionnée dans l'obligation même de Killaly.

Nous sommes tous d'opinion que cette connaissance n'est pas suffisante pour constituer Killaly en mauvaise foi, et, en conséquence, nous confirmons le rapport qui le colloque en préférence à Ross et autre.

DUVAL, juge : Cette doctrine de connaissance *antérieure*, par implication, tirée du droit anglais, n'est pas applicable ici, et est entièrement étrangère au droit français; même en Angleterre, on a poussé cette doctrine beaucoup trop loin, et l'on en a senti les inconvénients : un comité de la Chambre des Communes l'a dénoncée comme nuisible, et incompatible avec un bon système d'enregistrement. Je suis d'avis, en outre, que les dispositions de la première clause de la 4e Vict., ch. XXX, quant à l'inefficacité de telle connaissance, s'applique à tous les cas, et doit régler l'interprétation du reste de l'ordonnance.

MEREDITH, Justice : The main ground upon which the claimants, Ross and his sister, have contested the collocation in favour of Opposant Killaly, is that the mortgage, from Defendant to Killaly, upon which the claim of the latter is founded, expressly refers to the deed of sale upon which the claim of Ross and his sister is founded. Claimants Ross contend that, as Killaly knew of the existence of the deed upon which their claim rests, he must be presumed to have known the whole of the contents of that deed, and further that, as Killaly had full knowledge, or is to be presumed to have had full knowledge of their claim, at the time he acquired his own mortgage, he is bound by that claim, as if it had been duly registered. In support of these views, the learned counsel for claimants Ross cited numerous English cases, shewing that the Court of Chancery, in England, has repeatedly held " that, if a subsequent purchaser has notice, " at the time of his purchase, of any prior unregistered con- " veyance, he shall not be permitted to avail himself of his " title against that conveyance," and, also, shewing that it is an established rule, in the Court of Chancery, " that where a " purchaser cannot make out a title but by a deed which leads " him to another fact, he shall be presumed to have know- " ledge of that fact." I do not however deem it necessary to enquire how the present case would be affected by those rules, because I believe them to be opposed alike to the spirit of

any registry ordinance (1) and to the principles of our common law (2), and, therefore, of course, I do not intend to be guided by them. We have, in the present case, but a single question to determine, namely, is Killaly, as regards Ross and his sister, a *bonâ fide* hypothecary creditor for valuable consideration ? and, as was justly observed by the learned counsel for Killaly, our own laws are quite sufficient to enable us to determine this question, irrespective of English Chancery decisions, however valuable they may be in other respects. We know that the system of law, of which the english rules already adverted to form a part, is essentially different from our own law, and we know moreover that the wisdom of those rules has been more than questioned, even by those who may be presumed to be most favourable to them. Sir Wm. Grant, the Master of the Rolls, observed, in the case of *Wyat* vs. *Barwell*, (19 Vesey, 435.) " It has been doubted much " whether the Courts ought ever to have suffered the question " of notice to be agitated, as against a party who had regist- " ered his conveyance." Story, in his work on Equity Jurisprudence, N° 398, makes use of the same language, and also remarks : " This doctrine as to postponing registered to unre- " gistered conveyances, upon the ground of notice, has broken " in upon the policy of the Registration acts in no small " degree." We also find that the committee named by the House of Commons, when it was proposed to establish a general register in England, were of opinion " that a subsequent deed registered " ought to prevail over a prior deed un- " registered, although the party who registered the subsequent

(1) See proviso to 1st Sect. of the Ordinance.

(2) Pothier says : " Les formalités établies par la loi pour donner à quel- " qu'un connaissance de quelque fait ne se suppléent pas, et ne s'accomplis- " sent pas par équipollence : " and, with reference to substitution, the same author says, p. 495 vol. 1, Œuv. Posth : " Les tiers acquéreurs et créanciers " hypothécaires peuvent opposer le défaut d'insinuation, quand même il " serait justifié qu'ils ont eu connaissance de la substitution dans le temps " qu'ils ont contracté avec le grevé. L'ordonnance le décide, art. 33. On " aurait pu en douter ; car ces formalités n'ayant été établies que pour empê- " cher que ceux qui contracteraient avec le grevé ne fussent induits en erreur. " il aurait pu sembler que ceux qui n'ont pu être induits en erreur, à cause " de la connaissance qu'ils avaient de la substitution, ne peuvent se plaindre " ni opposer qu'elle n'a pas été insinuée. Les raisons de décider au contraire, " sont que les formalités ne se suppléent pas ; que la loi ayant voulu qu'on " donnât connaissance de la substitution par la voie de l'insinuation à tous " ceux qui pourraient contracter avec le grevé, toute autre connaissance " qu'ils ont pu en avoir d'ailleurs, ne doit pas être considérée. Le législateur " a passé une loi générale à laquelle il faut satisfaire. Si la loi eut laissé la " liberté d'entrer dans la discussion du fait, si celui qui a contracté avec le " grevé a eu connaissance ou non de la substitution, la discussion *aurait pu* " *donner lieu à des procès, qu'il était de la sagesse de la loi de retrancher : les* " *lois étant établies, non seulement pour y mettre un terme, mais pour les em-* " *pêcher de naître.*"

" deed had notice at the time that the prior deed had been " executed, but that, if it could be proved that the subse- " quent deed had been obtained by fraud, registration ought " not to give that deed validity." (1) Now what the committee of the House of Commons said ought to be the law in England is, I contend, already the law of Canada. Our law on this subject, as I understand it, is simply this, on the one hand, mere knowledge of an unregistered incumbrance will not bind a party, whose claim is duly registered, and, on the other, registration is inoperative for the purpose of covering fraud, or of giving validity to a fraudulent deed. (2)

Applying these principles to the present case, we find that, although the Opposant Killaly may be considered to have had what, according to the English rule, would be termed constructive notice of the claim of Ross and of his sister, yet, that there was nothing whatever which, according to the principles of our law, could, by any possibility, be deemed fraudulent on the part of Killaly. On the contrary, in so far as he was concerned, a fairer transaction than that now before us, could not come under the consideration of a Court of Justice. He therefore, in respect of the registered claim upon which his opposition, is founded is a *bonâ fide* hypothecary creditor, for valuable consideration, and, as such, is entitled to be collocated, according to the date of his registration, and, consequently, in preference to Ross and his sister.

As to the proviso, in the first section, which, in effect, declares that knowledge of an unregistered claim shall not have the effect of vitiating a registered claim, I will merely observe that, from the nature of the proviso, and from the manner in

(1) Sugden, V. & P. Vol. 3, p. 387. See also Hays, on conveyancing, Vol. 1, p. 491 : " upon the no less vital questions, whether knowledge by a purchaser " or mortgagee of a prior unregistered right shall be allowed to subvert his " registered title the Commissioners differ in opinion, five contending " against, and three supported by Mr. Bell in favour of the unregistered " right. *It is indeed conceded by the minority that mere notice of the unre-* " *gistered right, unaccompanied by circumstances of fraud ought not to prevail* " *against the Register.*"

(2) In the *Quebec Mercury*, of the 24th March, 1853, we read upon this subject, the following remarks ;

" The new Lord Chancellor of England, Lord Cranworth, from his place, in the House of Lords, lately, delivered a speech of a highly interesting character, being an announcement of his intentions in the matter of legal reform. The first point to which he intends to direct his best energies is the facilitation of the transfer of landed property, great inconvenience being now experienced in conveyancing, not so much however from the state of the law in this respect, as from the difficulty of ascertaining accurately the titles of the parties who wish to transfer ;—the noble lord proposes, therefore, that a proprietor should register his title *and that the purchaser should look to the register to discover the nature of that title, he also proposes to enact that nothing whatever should affect the title of land, except what my appear on the register.* Ed. L. C. Reports.

which it is worded, I think it must be deemed to extend to all claims that may be registered under the ordinance; and, with reference to the case now before us, it may be added that Killaly's claim, bearing date, as it does, after the registry law came into effect, was registered, not under the 4th section of the law, but under the section containing the proviso, namely the first.

JUDGMENT: The court, having heard the parties, upon the contestation raised, by Opposants Malvina Eliza Ross and Hector St. George Ross, to the opposition *à fin de conserver* filed by Honorable Hamilton H. Killaly; considering that, by the evidence adduced, it is established that, on the twenty-third day of September, 1843, Defendant, Dominick Daly, was lawfully indebted to Killaly in the sum of one thousand one hundred pounds, for so much money lent and advanced to Defendant, and that the deed of obligation, signed by Defendant, in favor of Killaly, before Griffin and another, notaries, at Montreal, on the twenty-third day of September, 1843 granted an hypothec to Killaly for securing the payment of said sum of one thousand one hundred pounds due and owing by Defendant to Killaly for the causes aforesaid, and that, by reason thereof, the allegations contained in the opposition of Killaly are proved, and the deed of obligation aforesaid established to have been signed for valuable consideration, and not for the fraudulent purposes alleged in the plea of perpetual exception *péremptoire en droit* filed in this cause, by Malvina Eliza Ross and Hector St. George Ross, doth over-rule the contestation filed by Malvina Eliza Ross and Hector St. George Ross, to said opposition *à fin de conserver* of Killaly.

The court having heard the parties, upon the contestation raised by the Opposants Malvina Eliza Ross and Hector St. George Ross, to the collocation, in favor of Killaly, mentioned in the report of distribution No. 1., on the sixth day of March 1851, considering that the deed of obligation signed by Defendant Daly, in favor of Killaly, and executed before Griffin and another, notaries, at Montreal, on the twenty-third day of September, 1843, was so signed by Defendant for a valuable consideration, Defendant having previously received from Killaly, as a loan, the sum of one thousand one hundred pounds current money, being the amount acknowledged, by said deed, to be due and owing by Defendants to Killaly, and considering further that the said sum of money was, by Killaly, lent and advanced to Defendant and the hypothec created by said deed, accepted in good faith by Killaly and the same duly registered at the Registry office for the county of Quebec, on the 18th day of November, 1846, as by law required: Considering, also, that, by reason of the premises, Killally is entitled

to be collocated for the amount by him claimed, in preference to Malvina Eliza Ross and Hector St. George Ross, who claim the capital of the *rente* created by deed of sale by James Ross *ès qualité*, to Daly, executed at Quebec, on the 5th day of April 1830, before Scott, and another, notaries. It is adjudged that the contestation of the report of distribution, on the part of Malvina Eliza Ross and Hector St. George Ross, in so far as respects the sum of money in and by the said report awarded to Killaly, for the cause aforesaid, be, and the same is hereby overruled and dismissed. (3 *D. T. C. B.*,p. 136.)

STUART, G. O., pour Ross.

STUART, A. pour Killaly.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 15 avril 1852.

Before BOWEN, C. J., DUVAL and MEREDITH, Justices.

GALE et al. *vs.* BROWN.

Jugé: Qu'un affidavit pour obtenir un *capias* est insuffisant, si, dans une action en dommages, pour marchandises avariées à bord d'un vaisseau, il n'y est pas dit, avec certitude, que les marchandises ont été ainsi avariées en la possession du Défendeur, et avant la livraison. (1)

This was an action of damages, against the master of a ship, for the value of goods damaged, while in his keeping and custody: the action was commenced by a *capias ad respondendum*. Defendant obtained a rule to quash the *capias*, on the ground of the insufficiency of the affidavit, inasmuch as it did not state that the damage complained of had been caused while the goods were in the custody and safe keeping of Defendant; and, also, on the ground that the action was for unliquidated damages. The court had no doubt that, in such case, a *capias* might issue. BOWEN, C. J., was of opinion that the affidavit was sufficient, and amply disclosed the cause of action. The majority of the court thought that the rule ought to be made absolute, because Plaintiffs had not sworn positively, that the damage had occurred before the delivery of the goods, and while they were in the custody of Defendant: there was an uncertainty as to the time and cause of the damages.

The following is an extract of the affidavit: " That Jacob Brown, of parts beyond the seas, master of the barque or

(1) V. art. 798 C. P. C.

vessel called the " Effort," is indebted to Plaintiffs, for damages to seventy-six bundles of galvanized tinned iron of them, said Andrew W. Hoffman and John V. Gale, and which said galvanized tinned iron said Jacob Brown received on board said vessel, at London, in England, on the 28th day of August now last past, from certain persons trading there under the firm of W. Chance, Son & Company, as agents of them, said John V. Gale and Andrew W. Hoffman, for which iron said Jacob Brown, in due form, signed a bill of lading, on the day aforesaid, whereby he acknowledged the same to have been received in good order, and agreed to deliver the same in like good order, to the order of said persons trading as aforesaid, under the firm of W. Chance, Son & Company ; that the persons last aforesaid endorsed said bill of lading to said John V. Gale and Andrew W. Hoffman, and, thereby, ordered said iron to be delivered to said John V. Gale and Andrew W. Hoffman, in good order, as aforesaid, yet, he, said Jacob Brown acted with such negligence that the damages aforesaid were sustained by said John V. Gale and Andrew W. Hoffman, in the premises, which damages have been since estimated, by competent surveyors, at the sum aforesaid."

JUDGMENT: The court, considering that Plaintiffs' affidavit is insufficient, inasmuch as it is not therein alleged that the damages of which Plaintiffs complain were caused while the iron, in said affidavit mentioned, was in the custody and safe keeping of Defendant, in virtue of the bill of lading alleged in said affidavit; it is ordered and adjudged (His Honor the Chief Justice, dissenting), that the arrest of Defendant be and the same is hereby set aside, and Defendant is hereby discharged from the custody of the Sheriff. (3 *D. T. B. C.*, p. 148.)

STUART, G. O., for Plaintiffs.

STUART and VANNOVOUS, for Defendant.

HYPOTHEQUE.—FORME.

BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1853.

Présents: SIR J. STUART, Bart., Juge en Chef, et PANET et AYLWIN, Juges.

LABADIE, Appelant, et TRUTEAU, Intimé.

Jugé : Que l'hypothèque sur un terrain, décrit par ses tenants et aboutissants, est une hypothèque d'un *corps certain*, quoique la contenance donnée soit moindre que celle qui existe véritablement; et que l'hypothèque grève le terrain dans sa totalité. (1)

(1) V. art. 2042 C. C.

La contestation en cette cause était entre deux Opposants, afin de conserver, sur la vente des immeubles de Simon Scipiot. Ce dernier, par acte du 28 novembre 1846, hypothéqua, en faveur du nommé Alarie, (cédant de l'Appelant Labadie) un terrain décrit comme suit : " Un lot de terre sis " en la ville de Montréal, de la contenance de 40 pieds de " front, sur 90 pieds de profondeur, le tout plus ou moins, " sans garantie de mesure précise, borné en front par la rue " Ste-Marie du Faubourg Québec, par derrière, par Maxime " Tremblay, d'un côté, par Olivier Raymond, et, d'autre côté, " par André Monarque, avec une maison à deux étages, bou- " langerie, *étable, remises et autres dépendances dessus* " *érigées*."

Le 19 octobre 1848, Scipiot donne à Truteau une hypothèque sur le même terrain décrit semblablement, sauf quant à la contenance, le lot étant declaré *de l'étendue qu'il peut avoir, tant en front qu'en profondeur.*

Sur jugement et exécution contre Scipiot, à la poursuite d'Emilie Truteau, le terrain en question fut saisi en plusieurs lots, dont le premier était désigné comme contenant " 43 pieds " de front sur la grand'rue du Faubourg Québec, et allant en rétrécissant jusqu'à 60 pieds de profondeur, où le dit emplacement n'a plus que 33 pieds de largeur, et, de là prend 16 pieds de largeur, sur encore 20 pieds de profondeur, tenant par devant à la dite grand'rue, par derrière, au dit Simon Scipiot, d'un côté, à André Monarque, et, d'autre côté, à Jérôme Durand, avec une maison à deux étages et autres bâtiments dessus construits." Le 2e lot était décrit comme " un morceau de terre situé au dit faubourg, de la contenance de 40 pieds de largeur, à prendre le long de la ligne de profondeur des emplacements de Jérôme Durand et du lot N° 1, où il est borné par devant, sur 44 pieds de profondeur, borné, le dit morceau de terre, en devant comme susdit, par derrière et d'un côté, par Maxime Tremblay, et d'autre côté partie par la Veuve Beaulieu et partie par les héritiers Panet avec les bâtisses dessus érigées."

Le lot No 1 seul fut vendu, et l'Appelant ayant filé une opposition à fin de conserver sur les deniers, pour être payé, suivant l'ordre de son hypothèque, fut primé par d'autres créanciers.

Le lot No 2 fut plus tard saisi en cette cause, à la poursuite de Gadourie, et est désigné comme suit au procès-verbal de saisie. " Un morceau de terre sis et situé au faubourg Ste-Marie, de la cité de Montréal, contenant 38 pieds de large, dans la ligne nord-ouest, et 40. 9, plus ou moins, dans la ligne sud-est, et 38 pieds plus ou moins dans la ligne sud-ouest, et 44, plus ou moins, dans la ligne nord-est, borné,

du côté nord-ouest, en partie par le lot No 2, ci-après désigné, et partie par l'emplacement de Labadie et Weekes (savoir le lot No 1, vendu à la poursuite de Emilie Truteau ci-dessus mentionnée) du côté du sud-est et du côté du nord-est, par Maxime Tremblay, et du côté sud-ouest, en partie, par Dame veuve Paul Hudon dit Beaulieu, et, en partie, par Richard Johnson, avec les bâtiments dessus contruits, ce morceau de terre n'a pas de sortie sur la rue Ste-Marie, ni ailleurs."

Ce lot fut vendu, et le shérif rapporta £71 13s 11d., comme produit de la vente, après déduction de ses frais. Les parties en cette cause produisirent leurs oppositions à fin de conserver; et un rapport de collocation, après paiement de quelques créances antérieures en hypothèque, accordait à Labadie la somme de £28 19s 0d., la balance des deniers prélevés, en déduction de sa réclamation comme cessionnaire dAlarie.

L'Intimé contesta cet ordre de collocation, alléguant " que Alarie ayant acquis une hypothèque sur un terrain de 40 pieds de front, sur 90 de profondeur, l'Appelant ne pouvait prétendre qu'il en avait acquis une sur un terrain de 40 pieds de front sur 118, dans une ligne, et 124, dans l'autre, de profondeur, " comprenant les deux lots ci-dessus décrits, et une lisière dont Scipiot n'avait que la jouissance, et dont le fonds appartenait à Jérôme Durand ; et que Labadie n'avait aucun droit d'être payé sur le lot en question. Il concluait à la réformation du rapport de collocation et à ce qu'il fût colloqué, aux lieu et placé de Labadie, attendu que l'hypothèque de lui (Truteau) s'étendait sur ce lot, Scipiot lui ayant hypothéqué son terrain, sans limites de contenance.

Le 28 décembre 1852, la Cour Supérieure, composée de Smith, Vanfelson et Mondelet, juges, rendit jugement comme suit :

" Considering that Labadie hath established, that the lot of " land, described in the *procès-verbal* of seizure annexed to the " writ of *fieri facias*, and the proceeds of which are now " before the court for distribution, is mortgaged and hypothe- " cated to him, as representing Jean Alarie, to the extent of " ten feet in depth, on the whole front of the said lot N° 2, " designated on the plan filed in this cause immediatly " in rear of lot N° 3, designated on said plan as having been " sold heretofore in the case of *Truteau* vs. *Scipiot*, as stated " in Labadie's exhibit number 2, and that the lot of land desi- " gnated in the obligation consented to by Defendant Scipiot, " in favor of Jean Alarie, represented by Opposant Labadie, is " not a mortgage given upon a *corps certain*, as wrongfully " pretended by Labadie, the court doth maintain his claim, to " the above extent of land only, and, in all other respects, " doth maintain the contestation filed in this cause, and there-

" upon, doth order that the *projet* of distribution, made and " filed by the prothonotary, be amended accordingly.

Labadie a interjeté appel, alléguant que l'hypothèque énoncée en l'obligation consentie par Scipiot à Alarie, avait été constituée sur un corps certain indiqué par des tenants et aboutissants, et avec plus ample désignation des dépendances, dont une partie se trouvait sur le terrain en question en cette cause : que, s'il y avait erreur, ce ne pouvait être que sur la contenance et non sur la nature et situation des lieux ; que, d'ailleurs, en supposant que Labadie ne devrait avoir d'hypothèque sur 90 pieds de profondeur, lorsque le terrain, dans les limites données, en a 118 pieds dans une ligne et 124 dans l'autre, que Truteau n'avait pas fait voir que ces 90 pieds devaient se prendre à partir du niveau de la rue Ste. Marie plutôt que de la ligne de division de Maxime Tremblay, et enfin que Truteau n'avait pu être induit en erreur par l'indication de l'immeuble hypothéqué en faveur d'Alarie (1).

L'Intimé soutint le bien jugé, et cita à l'appui de ses prétentions les autorités en note. (2)

La Cour d'Appel donna gain de cause à l'Appelant pour les motifs suivants : " Considering that, from the nature of the " description of the lot of ground hypothecated by Scipiot to " Alarie, represented by Appellant, in and by the notarial " obligation, executed before Montreuil and another, notaries, " and bearing date the twenty-eighth day of November, 1846, " absolute certainty is given to the extent of the ground, in- " tended to be hypothecated, which is described as a block " comprised in certain specified visible limits, and upon part " of which, being that in question in this case, buildings are " mentioned as having been erected and subsisting, and that, " in this extent, the whole of the lot designated as number 2 " on the plan, filed in this cause, and not 10 feet only, as

(1) Autorités citées par l'Appelant : Dict. Jurisp. Dalloz, *verbo* hypothèque, p. 89, N°s 78, 79, 92, 93 ; Ibid, *vbo* Inscription, p. 121, N°s 334, 335, 343 ; 19 Duranton, p. 569, N° 369 ; 3 Battier, *Privilèges et hyp.*, p. 154, N°s 421-3 ; 5 Répert. Merlin, *vbo* Hypothèque, p. 828, 2e col ; et p. 915 1ère col., dit de 1808 ; Merlin, *Question de droit*, vbo *fait du souverain*, p. 525, 2e col. ; 2 Troplong, *Privilèges et hyp.*, p. 368, N° 536 *bis*, et p. 370 ; 3 Ibid, p. 139, N° 689 ; 3 Dict. du Notariat, *vbo* Hypothèque, p. 300, N° 108; 1 Persil, *Régime hyp.*, p. 305, N° 5, sur l'art. 2125 ; Dalloz, *Jurisp. du Royaume*, vbo *Hypothèque*, p. 297 ; Pothier, *Vente*, no 254 ; Rép. Guyot, *vbo* vente, p. 481 ; Lacombe, *vbo* vente, p. 807, sur l'indication des tenants et aboutissants ; 4 Anc. Dénizart, *vbo* tenants, p. 680, N° 2 ; 1 Nouv. Dénizart, p. 48, *vbo* aboutissants ; Pothier, *des Hypothèques*, ch. III, sect. 1, p. 467, *in fine ;* Henrys, p. 590, quest. 85.

Sur la définition d'un corps certain et sur la mention imparfaite de la contenance par surabondance : 1 Bourjou, p. 420, art. 57, 58, sur l'acquisition des immeubles ; Anc. Dénizart, *vbo* vente ; N° 62, p. 806.

(2) Autorités citées par l'Intimé : 1 Bourjon, p. 482, N°s 47, 48 : 1 Despeisses, pp. 46, 47, partie 1, sect. 5.

" supposed in the judgment of the court below, was and is " comprehended, and that, although a less depth is assigned to " the hypothecated premises than the said lot contains, it " cannot thence be inferred that it was not the intention of " the debtor to hypothecate the whole lot, specification of the " contents of the said lot being altogether superfluous, in " addition to the description given by visible limits and " and bounds, and by reference to buildings, on the said lot, " and an error in such specification being immaterial; and " considering therefore, that, in the rendering of the judg- " ment of the Court below, there is error: it is adjuged that " the judgment appealed from be, and the same is hereby " reversed, and it is further adjudged that the contestation of " the report of distribution, in the court below, by Res- " pondent, be and the same is hereby overruled." (3 *D. T. B. C.*, p. 155.)

LAFRENAYE, pour l'Appelant.

DORION, Conseil.

MOREAU, LEBLANC et CASSIDY, pour l'Intimé.

FEMME MARIEE.—OBLIGATION AVEC SON MARI.

BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1853.

JODOIN, Appelant, et DUFRESNE & ux., Intimés.

Jugé: Qu'une femme ne peut s'obliger avec son mari que comme commune, et que dans l'espèce un cautionnement par une femme, conjointement avec son mari, pour un tiers, est nul d'après les dispositions de l'Ordonnance de la 4e Vict., ch. xxx, sect 36.

Le 15 aout 1844, Denis Larivée consent une obligation à Jean Baptiste Jodoin (l'Appelant), pour 6000 francs, au paiement de laquelle somme Dufresne et Julie Gazaille, sa femme, (Intimés) se portent cautions solidaires, avec hypothèque spéciale sur une terre désignée à l'acte, et qui était un propre de Julie Gazaille.

Le 12 août 1848, Jodoin obtient jugement pour ce montant contre Larivée, Dufresne et sa femme; et, le 10 avril 1851, il intente une action hypothécaire contre Laflamme et sa femme, donataires de l'immeuble hypothéqué par Dufresne et sa femme.

Sur cette demande, Julie Gazaille, assistée de son mari, intervient, prend le fait et cause des Défendeurs, et conteste la demande de Jodoin, alléguant que cet immeuble lui est propre; que, sur sentence en séparation de biens par elle obtenue le 2 avril 1850, postérieurement au cautionnement sus-

dit, elle a renoncé à la communauté ; "qu'ayant renoncé à la " communauté, l'obligation par elle contractée par le cautionne- " ment se trouve éteinte et anéantie quant à elle, ainsi que " l'hypothèque stipulée dans le dit acte de cautionnement sur " le dit immeuble ; qu'elle était également, par sa renoncia- " tion, déchargée de l'effet du jugement rendu contre elle " durant l'existence de la communauté, et qu'en supposant que " le cautionnement et le jugement ne seraient pas nuls de plein " droit, par l'effet de la renonciation à la communauté, elle " aurait droit de demander d'en être relevée." Elle concluait " à ce que le cautionnement et le jugement fussent déclarés " nuls quant à elle ; qu'elle fût déchargée de toute obligation " en vertu du dit cautionnement et de la condamnation pro- " noncée contre elle par le jugement, et la dite terre déchar- " gée de l'hypothèque qui aurait pu résulter du cautionnement " et du jugement, et enfin que l'action du Demandeur fût " déboutée."

Le jugement de la Cour Supérieure, rendu le 12 octobre 1852, donna gain de cause aux Intimés, et est motivé comme suit :

" The court doth maintain the intervention and, conside- " ring that the intervening parties have established the mate- " rial allegations of the exceptions by them pleaded, and that " Marie Julie Gazaille dite St. Germain, one of the interve- " ning parties, by the obligation in Plaintiff's declaration " mentioned, whereby she became surety, conjointly with her " said husband, by law, could only bind and oblige herself as " *commune en biens* with Jean Baptiste Dufresne, her hus- " band, and that, since the execution of said obligation, and " of the judgment thereupon rendered against said interve- " ning parties Marie Julie Gazaille dite St. Germain hath " obtained a judgment of *séparation de biens* from her hus- " band, and hath renounced the *communauté de biens* which " subsisted between them, and it hath been established and " appears that the lot of land and premises hypothecated by " intervening parties, was and is a *propre* of Marie Julie " Gazaille dite St. Germain ; and, considering that, by reason " of the premises, and by law, Marie Julie Gazaille dite St. " Germain hath become freed and discharged from all liabi- " lity to pay any sum under said obligation, or of the judg- " ment rendered thereupon, and that Plaintiff hath no right " of hypothecation upon said land and premises, maintaining " the said exceptions, doth dismiss the said action."

Jodoin appela de cette sentence, prétendant que, par la 36e clause de l'ordonnance de la 4e Vict., ch. xxx, la nullité qui y est établie n'est que relative aux engagements contractés par une femme mariée dans le but de cautionner la dette de son

mari, et que le motif du législateur, en faisant cette disposition était d'éteindre, en faveur de la femme, l'hypothèque qui résultait de ces cautionnements; que cette clause ne peut s'étendre aux cautionnements de la femme envers un tiers. (1)

L'Intimée soutenait que toute obligation consentie par la femme avec son mari pour un tiers, est plutôt pour sûreté de l'obligation du mari que de celle du tiers; qu'en supposant même qu'il en serait autrement la femme n'en serait pas moins libérée par sa renonciation à la communauté, d'après la lettre et l'esprit de l'ordonnance, dont le but était par là de soustraire la femme aux obsessions du mari, et de protéger les droits que l'ordonnance lui laissait. (2)

Le 12 mars 1853, la Cour du Banc de la Reine jugea comme suit: " Considering that the obligation of Marie Julie Gazaille, " wife of Jean Baptiste Dufresne, as surety, jointly with her " husband, of Denis Larivée, dated the 15th August, 1844, was " made and entered into in violation of the provisions con- " tained in the 36th Section of the Registry Ordinance of the " 4th Vict., ch. XXX; and considering therefore, that this ' hypothecary action of Jean Baptiste Jodoin, against Jean Baptiste Laflamme and Lucia Dufresne, his wife, was and is ' without legal foundation; and, considering, therefore, that ' in the rendering of the judgment of the court below, there " is no error, it is adjudged that the judgment appealed from " be, and the same is hereby, affirmed ". (*3 D. T. B. C.*, p. 189.)

DRUMMOND, LORANGER et DUNLOP, pour l'Appelant.

CHERRIER, DORION et DORION, pour l'Intimée.

(1) Autorités citées par l'Appelant: Bacquet, *Droits de Justice*, ch. XXI, p. 226, Art. 98; 1 Bourjon, *Communauté*, p. 661, No 41, Note; 1 Duplessis, p. 417; 2 Troplong, *Contrat de Mariage*, pp. 311 à 318, Nos 1042 à 1049; 3 Delvincourt, Notes sur la page 23; 14 Duranton, No 248.

Sur l'Interprétation de la clause en question: 1 Solon, *Nullités*, p. 13, V. 25, 3e règle; Ibid., p. 38, V. 67; 1 Domat. (Edit. in 8°) p. 90, No 15.

(2) Autorités de l'Intimée: Pothier, *Communauté*, Nos 729 732; Troplong, *Contrat de Mariage*, Nos 1042 et suiv.; Merlin., *Répert.*, vbo *Inscrip. hypothec.*, sect. 3.

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" L'omission par un appelant d'annexer copie du cautionnement en appel à la requête en appel est fatale, et la cour ne permettra pas que l'appelant en pareil cas, supplée telle omission en produisant une copie du cautionnement 195

" Lorsqu'un Défendeur a fait défaut de comparaître, et que tel défaut a été enregistré, il n'est pas nécessaire d'une motion pour procéder *ex parte*. 81

" Lorsqu'une objection à l'enquête a été décidée et maintenue, et que la partie adverse a procédé à l'examen du témoin, et que la déposition a été close sans réserve, la cour ne revisera pas la décision du juge donnée à l'enquête 439

" On ne peut mettre en question la légalité d'une exception ou d'un plaidoyer quelconque, qu'au moyen d'un plaidoyer en droit, contenant les moyens de droit que l'on entend faire valoir contre ce plaidoyer 134

" On ne peut prendre exécution sur un jugement rendu contre quatre Defendeurs si l'un d'eux a interjeté appel de ce jugement, et si cet appel est encore pendant 166

" Sous la section 25 du ch. XXXVIII des Statuts du Canada, 12 Vict., une exception à la forme et un plaidoyer de paiement ne peuvent être plaidés conjointement et en même temps 39

" Sous le Statut 12 Vict., ch. XXXVIII, section 85, il est nécessaire, dans une défense au fonds en fait, de nier chacun des faits allégués en la déclaration 107

" Sous les dispositions du Statut 12 Victoria, ch. XXXVIII, sec. 79, un bref de saisie-arrêt après jugement peut être rapporté en vacance. Il est du devoir de l'huissier de délivrer tel bref avant le jour du rapport, soit au procureur ou à la partie qui le lui a remis ou de le produire au greffe. Ayant reçu ce bref comme huissier, il ne lui sera pas permis de soutenir qu'il n'y a pas de preuve qu'il soit huissier. La preuve du montant dû par

le tiers-saisi au Défendeur ainsi que la saisie faite entre les mains du tiers-saisi, et du paiement à d'autres qu'au Demandeur, est suffisante pour donner le droit au Demandeur de recouvrer des dommages contre l'huissier qui n'a pas exécuté son bref..... 101

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" :— " ACTION PAULIENNE.
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" :— " SCIRE FACIAS.
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SAISIE RÉELLE :—*Vide* PROCÉDURE.
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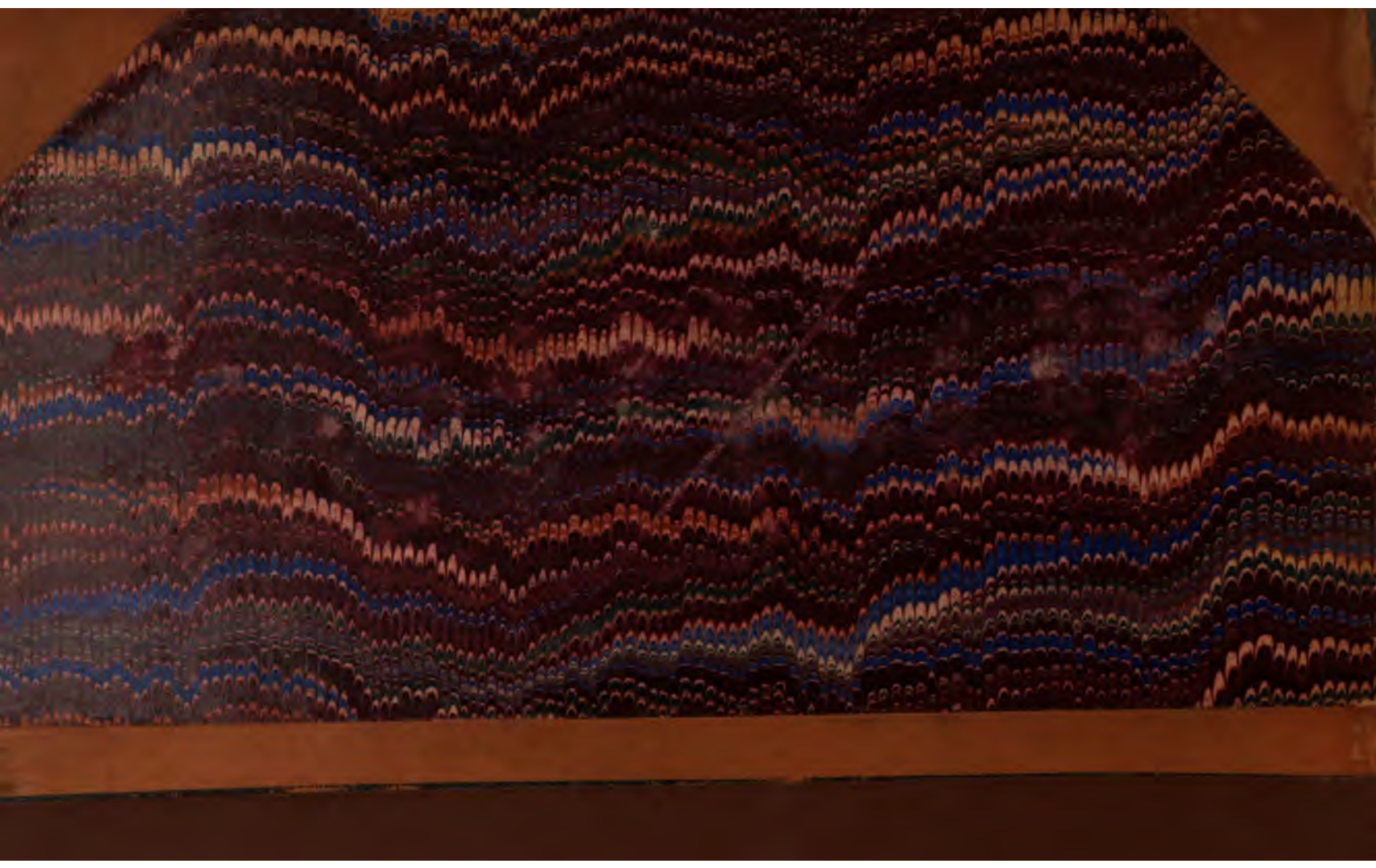
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